Supreme Court, U.S.
FILED
96 452 SEP 23 1996
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

EARL G. PITRE, Jr., EARL G. PITRE, Sr. and JOAN PITRE,

Petitioners,

v.

LOUISIANA TECH UNIVERSITY AND STATE OF LOUISIANA THROUGH THE BOARD OF TRUSTEES FOR STATE COLLEGES AND UNIVERSITIES,

Respondents.

On Petition For A Writ Of Certiorari To The Louisiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

GREGORY P. MASSEY ESQ.*
1301 Common Street
Post Office Box 3148
Lake Charles, Louisiana 70602
(318) 439-2774

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

96-1?

QUESTIONS PRESENTED

The Louisiana Supreme Court has abandoned and ignored the constitutionally based and jurisprudentially driven procedural steps it has adopted for proceedings held before it, the standard of appellate review, in its reversal of a compensatory damage award against the state, on Writ of Certiorari from the Court of Appeal, Second Circuit.

The Louisiana Courts may review both law and facts in civil cases, however, the courts have a long established constitutionally based and jurisprudentially driven rule, the standard of appellate review. The standard of appellate review of factual findings is limited to the following: findings of fact will not be disturbed on appellate review without finding that the record reviewed in its entirety clearly shows that the factfinder was clearly wrong or manifestly erroneous; **conversely, where there are two permissible views**, the factfinder **cannot** be clearly wrong or manifestly erroneous and a reviewing court may not substitute its own reasoning of the facts even if convinced it would have weighed the evidence differently.

The questions presented are:

1. Does the Due Process Clause of the Fourteenth Amendment of the United States Constitution require that a state appellate court comply with its own standards of review before reversing the decision of the lower court awarding compensatory damages against the state?

QUESTIONS PRESENTED - Continued

2. Where Louisiana State law prohibited plaintiffs a trial by jury in civil cases against the state, is the plaintiff entitled to strict compliance with the standard of appellate review, by state courts and to strict scrutiny of state actions?

3. Can the Louisiana Supreme Court deny law-abiding citizens, in a civil case against the state, the right to due process and equal protection guaranteed by the Fourteenth Amendment of the U.S. Constitution and Article I, Sections (2) and (3) of the Louisiana Constitution by failing to comply with the long established standard of appellate review in its reversal of a judgment rendered against the state?

LISTING OF PARTIES

The following persons or entities participated in the proceedings in the Third Judicial District, Parish of Lincoln; and in the Second Circuit Court of Appeal and in the Louisiana Supreme Court:

1. Earl G. Pitre, Jr., Earl G. Pitre, Sr. and Joan Pitre.

   Plaintiffs in the District Court
   Appellants in the Court of Appeal
   Applicants/Respondents in the Louisiana Supreme Court

2. Louisiana Tech University and State of Louisiana Through the Board of Trustees for the State Colleges and Universities.

   Defendants in the District Court
   Appellees in the Court of Appeal
   Applicants/Respondents in the Louisiana Supreme Court

3. State of Louisiana Department of Health & Hospitals
   Intervenor in District Court
   Did not appeal trial court ruling

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LISTING OF PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 9

I. The United States Supreme Court has consistently held in recent punitive damage award cases that compliance with the judicial standard of appellate review is an essential constitutional safeguard and is founded in the Due Process Clause of the Fourteenth Amendment of the Constitution. The Louisiana Supreme Court did not comply with its own jurisprudentially driven procedural standard of appellate review in its reversal of a compensatory damage award against the state, and this is the compelling reason for this Court to grant this petition 10

TABLE OF CONTENTS – Continued

Page

II. The Louisiana Courts' long established standard of appellate review of factual findings is limited to the following: factual findings may not be set aside unless the record reviewed in its entirety indicates there is manifest error; **conversely**, where there are two permissible views the fact-finder cannot be clearly wrong or manifestly erroneous, and a reviewing court may not substitute its own line of reasoning even if convinced that it would have weighed the evidence differently. The Louisiana Supreme Court violated petitioners' Fourteenth Amendment Due Process Rights when it did not comply with traditional procedure in its reversal of the judgment against the state 12

III. The Louisiana Supreme Court has violated petitioner's Fourteenth Amendment Due Process and Equal Protection Rights and those Rights as granted by Article 1 Secs. 2 and 3 of the Louisiana Constitution. When a person has suffered injury for which the injured party has a cause of action, such a cause of action is a vested property right. State action which denies due process and equal protection is prohibited and judicial action may be state action 17

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASE CITATIONS:

UNITED STATES SUPREME COURT CASES:

Collins v. City of Harker Heights, Tex., 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) 18

Endicott-Johnson Corp. v. Encyclopedia Press, Inc., 266 U.S. 285, 45 S.Ct. 61 (1924) 13

Gibbes v. Zimmerman, 290 U.S. 326, 54 S.Ct. 140, 78 L.Ed. 342 (1933) 17

Lassiter v. Department of Social Services of Durham City, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981) 13

Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) 10

TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S.Ct. 2711 (1993) 10

FEDERAL COURT OF APPEALS CASES:

Chavez v. Noble Drilling Corporation, 567 F.2d 287 (5th Cir. 1978) 13

Wilwording v. Swenson, 502 F.2d 844 (5th Cir. 1974), *cert. denied*, 95 S.Ct. 835, 420 U.S. 912, 42 L.Ed. 843, *on remand*, 405 F. Supp. 447 17

FEDERAL DISTRICT COURT CASES:

Horn v. O'Cheskey, 387 F. Supp. 1280 (D.C.N.M. 1974) 19

Hosey v. Club Van Cortlandt, 299 F. Supp. 501 (D.C.N.Y. 1969) 19

Whiteside v. Kay, 446 F. Supp. 716 (W.D. La. 1978) 19

TABLE OF AUTHORITIES – Continued

Page

STATE COURT CASES:

American Guaranty Co. v. Sunset Realty & Planting Co., 208 La. 772, 23 So.2d 409 (La. 1944) 16

Annis v. Shapiro, 517 So.2d 1237 (La. App. 4th Cir. 1987) 13

Arceneaux v. Domingue, 365 So.2d 1330 (La. 1978) 14

Burmaster v. Gravity Drainage Dist. No. 2 of St. Charles Parish, 366 So.2d 1381 (La. 1978) 17

Canter v. Koehring Co., 283 So.2d 716 (La. 1973)..... 14

Davis v. Teche Lines, 200 La. 1, 7 So.2d 365 (La. 1942) 16

Faucheaux v. Terrebonne Consolidated Government, 116 So.2d 289 (La. 1993) 13

Foster v. Hampton, 352 So.2d 197 (La. 1977)..... 17

Harris v. Pizza Hut of La, Inc., 455 So.2d 1364 (1984) 13

Jones v. Blossman, 209 La. 530, 25 So.2d 85 (La. 1946) 15

Ludeau v. Stromer, 199 La. 842, 7 So.2d 70 (La. 1942) 16

Mundy v. Dept. of Health & Human Res., 620 So.2d 811 (La. 1993) 13

Reichenphader v. Allstate Ins. Co., 402 So.2d 311 (La. App. 4th Cir. 1981), *writ granted*, 404 So.2d 1261, *affirmed*, 418 So.2d 648..... 17

Rosell v. ESCO, 549 So.2d 840 (La. 1989) 14

TABLE OF AUTHORITIES – Continued

Page

Smith v. Dison, 662 So.2d at 94 (La. App. 4th Cir. 1995) 19

State ex rel. Theriot v. Pulling, 209 La. 871, 25 So.2d 620 (La. 1946) 15

State Dep't of Transp. & Dev. v. Schwegmann Westside Expressway, Inc., 95-1261, 669 So.2d 1172 (La. 3/1/96) 14

Stobart v. State Through Dep't of Transp. & Dev., 617 So.2d 880 (La. 1993) 14, 15

Virgil v. American Guar. and Liab. Ins. Co., 507 So.2d 825 (La. 1987) 14

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. XIV 2, 12, 17

STATE CONSTITUTIONAL PROVISIONS:

LSA-Const. art 1 sec. (2) 16, 17

LSA-Const. art 1 sec. (3) 16, 17

STATUTES:

28 U.S.C. sec. 1257 2

RULES:

Sup. Ct. R. 10 (1995) 18

PETITION FOR A WRIT OF CERTIORARI

Earl G. Pitre, Jr., Earl G. Pitre, Sr. and Joan Pitre respectfully petition this Court for a writ of certiorari to review the judgment of the Louisiana Supreme Court entered in these proceedings on May 10, 1996. Rehearing was denied June 28, 1996.

OPINIONS BELOW

The opinion of the Third Judicial District Court, Parish of Lincoln, Louisiana, granting Summary Judgment is not reported. The opinion of the Court of Appeal for the Second Circuit reversing and remanding for trial is reported at 596 So.2d 1324 (La. App. 2 Cir. 1992). The rehearing sought by defendants was denied. The Louisiana Supreme Court denied writs by the defendants and the memorandum opinion is reported at 604 So.2d 998 (La. 1992). Following a bench trial, the trial court rendered an unreported decision finding no duty owed by defendants. The Court of Appeal for the Second Circuit reversed the trial court, finding in favor of plaintiffs, finding a duty and a breach of duty, and awarded damages. This is reported at 655 So.2d 659, No. 26,388 (La. App. 2 Cir. 5/10/95) *Appendix C.* On May 10, 1996 the Supreme Court of Louisiana in a divided opinion, 2-3-2, reversed the Second Circuit and this is reported at 673 So.2d 585, Nos. 95-1466, 95-1487 (La. 5/10/96) *Appendix A.* The Louisiana Supreme Court denied rehearing on June 28, 1996 ___ So.2d ___, 95-C-1 466 *Appendix B.*

JURISDICTION

The opinion of the Louisiana Supreme Court reversing the judgment of the Second Circuit Court of Appeal, which found a duty and a breach of duty and awarded damages to plaintiffs, was entered on May 10, 1996. (Appendix A) The Louisiana Supreme Court denied petitioners' petition for rehearing on June 28, 1996. (Appendix B)

Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which provide in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

STATEMENT

This case is before this Court seeking a Writ of Certiorari to review the actions of the Louisiana Supreme Court in abandoning or ignoring, in this case, the constitutionally based and jurisprudentially driven procedural steps adopted by that Court as the standard of appellate

review, in its reversal of a compensatory damage award against the state.

After the Louisiana Supreme Court reversed a judgment in favor of the plaintiffs, a rehearing was requested at which time the plaintiffs asserted that their constitutional rights of due process and equal protection had been violated by the judicial actions of the Louisiana Supreme Court. In denying a rehearing the Louisiana Supreme Court did not address the constitutional issues raised.

Plaintiffs are U.S. citizens and residents in the State of Louisiana. Suit was brought against Louisiana Tech University and the State of Louisiana Through the Board of Trustees for the State Colleges and Universities, for injuries sustained by Earl G. Pitre, Jr. on the college campus on January 7, 1988.

A. Factual Background

Petitioner, Earl G. Pitre, Jr., a 20-year-old, a resident of Southwest Louisiana and third-year resident student, was rendered paralyzed from mid-chest down due to an injury suffered on the campus at Louisiana Tech University (hereinafter referred to as La. Tech) while sledding, at the hill at the Thomas Assembly Center which sloped into a ***parking lot area***, during a winter storm in north Louisiana on January 7, 1988 at 11 p.m.

Petitioner alleged that La. Tech, by encouraging resident students to participate in sledding activities on campus, owed him a duty to warn and protect him from areas known by La. Tech to be dangerous and/or to

provide a safe area on campus for the encouraged activity. By failing to provide reasonable care, La. Tech breached its duty and this breach was the cause in fact of the injuries sustained by petitioner.

A review of the trial record in its entirety shows that the Winter Storms Bulletin placed on the bed of each resident student by the La. Tech Housing Authority, encouraged sledding on campus in proper areas using good judgment, and only prohibited sledding on Tech Drive and behind moving vehicles. The bulletin stated that there were 15 such accidents during the last snow storm.

The record shows that the La. Tech campus police had a policy to prohibit all sledding on campus in dangerous areas, especially into Tech Drive and ***into parking lots***, like the hill at the Thomas Assembly Center. La. Tech had specific knowledge that sledding at the hill posed a danger as did sledding into Tech Drive, but La. Tech failed to take the same precautionary measures to prevent sledding at the hill as it did to prevent sledding into Tech Drive.

The Housing Authority and the Campus Police were under the same department on the La. Tech organizational chart. Both were responsible for the safety of resident students on campus. These two departments met at monthly department head meetings, yet there was no communication between them with regard to the knowledge each had about the dangerous areas for sledding on campus. The Housing Authority considered Tech Drive to be a dangerous area, while the Campus Police considered all areas leading ***into parking lots*** to be known dangerous

areas for sledding. It was the lack of communication between these two departments that led to the accident suffered by petitioner.

The record shows that the experts testified that the hill at the Center gave the "illusion of a proper place" to participate in the encouraged activity of sledding because of the spacious area and 150 foot distance between the light poles in the parking lot area. The evidence (Bunting Video) showed that the concrete base of the poles were not illuminated with special yellow paint to off-set the base of the poles from the concrete in the parking lot.

Furthermore, the experts agreed that there were no proper areas on campus for sledding. However, they testified that the hill could have been inexpensively transformed into a proper area for the encouraged activity of sledding by using bales of hay from the Agriculture Department to cushion the concrete base of the poles. In the alternative, La. Tech could have taken the same precautionary measures to prevent sledding at the hill as it did to prevent sledding at Tech Drive.

There were fifty or more students sledding at the hill that evening. Those who testified, while noting the lighting in the area, testified that they did not perceive the poles to be a danger. All the students were taking turns going down the hill on the makeshift sleds available to them. The record indicates that La. Tech was aware that the students were using makeshift sleds and that La. Tech did not provide proper equipment for the encouraged activity. The students using the four-foot plastic garbage can lid went down the hill head first on their backs since this position protected the private parts of the sledders.

The students testified that if they had been warned not to sled in that area they would not have sled.

The record confirms that the petitioner struck the base of a street light, not a parking lot light. The Bunting Video and the testimony of petitioner and Mr. Bunting shows that from the hill this particular light appeared to be attached to the nearby stadium and not attached to a pole. This pole only had one light, this light was extended away from the hill towards the street, the base of the pole facing the hill was not illuminated. The trial court found that the petitioner, Earl Pitre, Jr., a non-drinker, was responsible, cautious and obedient and that he would not have sled at the hill had he been informed not to sled in that area.

A review of the record shows that La. Tech's expert was impeached by his own writing when he testified that an unwritten Campus Police policy against sledding was not a policy at all.

La. Tech argued that it did not owe a duty to petitioner, that it did not have superior knowledge of the danger at the hill which sloped into a ***parking lot*** area and that the light poles were obvious. La. Tech argued that snow storms on campus only occurred every five or so years. However, on cross-examination of its witness, police Sgt. Sears, it was shown that snow storms in North Louisiana were more frequent. La. Tech also argued that petitioner assumed the risk by sledding in the area at the hill.

The defense of the assumption of risk was overturned when Louisiana jurisprudence established the duty/risk analysis. The duty/risk analysis requires that

the defendants actions must be examined apart from the knowledge of the plaintiff.

B. Procedural History

La. Tech and petitioner sought Summary Judgment on the issue of duty. The Third Judicial District Court granted Summary Judgment in favor of La. Tech dismissing petitioners' suit. Petitioners' appealed this ruling to the Second Circuit Court of Appeal. The Second Circuit Court of Appeal initially affirmed the Summary Judgment. On rehearing, the Second Circuit Court of Appeal reversed its finding and remanded for trial. The Louisiana Supreme Court denied the defendants' writ, stating that a review was not warranted at this time in the proceedings.

This was a civil action brought against the State of Louisiana. State law prohibited a trial by jury. Trial was held before the district judge in the Third Judicial District Court in Lincoln Parish. The trial judge failed to follow the ruling of the Second Circuit Court and revisited the question of duty, finding that La. Tech did not owe a duty to petitioners. The district court did not address the factual findings with regard to breach of duty, comparative fault and damages.

Petitioners appealed to the Second Circuit Court of Appeal. The Second Circuit found the trial court erred in revisiting the duty question. Finding the duty issue to be the law of the case, the Second Circuit reinstated its finding that a duty was owed and proceeded to a *de novo* review of the entire record. The Second Circuit found that La. Tech breached its duty to the petitioners, and that this

breach was the cause in fact of the injuries sustained by the petitioners; finding petitioner was 75% at fault, La. Tech was 25% at fault and awarded damages.

La. Tech and petitioners applied for Writs to the Louisiana Supreme Court, which were granted. The Louisiana Supreme Court in a divided decision, 2-3-2, reversed the Second Circuit Court of Appeal. Only the two-justice majority found the appellate court had committed legal error in its finding a duty. The remaining five members of the panel found no legal error, however, three members concurred, finding no breach of duty, a factual finding, without complying with the long established jurisprudential standard of appellate review, nor did the concurring opinion state the laws and/or the jurisprudence relied upon to reverse the trier of fact on a factual issue. The remaining two justices dissented.

Petitioners requested a rehearing, arguing that the jurisprudential standard of appellate review was abandoned by the Louisiana Supreme Court in this case in its reversal on a factual issue, and furthermore, that the failure of the Court to adhere to the well established standard of appellate review was a violation of the petitioners' right to due process and equal protection.

Rehearing was denied on June 28, 1996.

Thus, petitioners are filing this petition seeking a writ to the Louisiana Supreme Court.

REASONS FOR GRANTING THE PETITION

This Court should grant Pitres' petition for a Writ of Certiorari because in this case against the State, the Supreme Court of Louisiana abandoned the jurisprudentially driven standard of appellate review. The standard of appellate review of factual findings is limited to the following: factual findings may not be set aside unless the record, reviewed in its entirety, indicates there is manifest error; *conversely*, where there are two permissible views the factfinder cannot be clearly wrong or manifestly erroneous and a reviewing court may not substitute its own line of reasoning even if convinced that it would have weighed the evidence differently. The Louisiana Supreme Court did not cite any law nor jurisprudence relied upon to reverse the judgment of the factfinder, the Second Circuit Court of Appeal.

This action by the Louisiana Supreme Court is a gross departure from the jurisprudentially driven standard of appellate review, is erroneous, and is such an aberration from accepted judicial standards that it is violative of petitioners' constitutional rights of due process and equal protection that it requires that this Court exercise its supervisory powers.

I. The United States Supreme Court has consistently held in recent punitive damage award cases that compliance with the judicial standard of appellate review is an essential constitutional safeguard and is founded in the Due Process Clause of the Fourteenth Amendment of the Constitution. The Louisiana Supreme Court did not comply with its own jurisprudentially driven procedural standard of appellate review in its reversal of a compensatory damage award against the state, and this is the compelling reason for this Court to grant this petition.

In recent years, appellate supervision and control over lower court damage awards has become an issue of increased interest, perhaps fueled by the general national debate over the broader question of tort reform. This Court's interest in the area is manifested in its line of cases which grappled with the difficult question of the constitutional limits of punitive damage awards. While ultimately approving of such awards, this Court has held that an essential constitutional safeguard is meaningful and explicitly defined appellate review. *See Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 24, 111 S.Ct. 1032, 1045, 113 L.Ed.2d 1 (1991). At least two members of this Court have viewed this Court's plurality decision in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711 (1993), as suggesting that there is a federal constitutional right to a substantively correct review of punitive damage awards. *See* 509 U.S. 443, 471, 113 S.Ct. 2711, 2727, Scalia and Thomas, JJ., concurring. While there does not appear to be any guidance on whether the same rule applies to compensatory damage awards, even the concurring justices in *TXO* notes that "[p]rocedural due process also requires, I am certain, judicial review of

the sufficiency of the evidence to sustain a civil jury verdict, and judicial review of the reasonableness of jury-awarded compensatory damages (including damages for pain and suffering)," although they doubted whether there was a federal constitutional right to a correct assessment of such damages. *Id.*

The question presented herein is perhaps more basic (and therefore easier to answer), but no less important. Do the substantive, and more particularly, procedural limitations on compensatory damage awards imposed by the due process clauses include the requirement that an appellate court reviewing such awards follow its own established and ordained standards of review before such an award can be reversed? A definitive answer to this question would contribute much to the tort reform movement in that it would clearly delineate the appellate court's role. Tort reform, while a laudable goal, should not be achieved at the expense of the constitutional rights of the litigants.

It is reasonable to conclude that this Court would find that the constitutional right to a substantively correct review (i.e. traditional procedure) is a fundamental right in compensatory damage awards also, and that this right is guaranteed by the Due Process Clause of the Fourteenth Amendment. Does the due process clause require that appellate courts in Louisiana comply with the established and ordained standards of review which contain procedural limits for reviewing and reversing factual findings, before a compensatory damage award against the state of Louisiana can be reversed?

II. The Louisiana Courts' long established standard of appellate review of factual findings is limited to the following: factual findings may not be set aside unless the record reviewed in its entirety indicates there is manifest error; *conversely*, where there are two permissible views the factfinder cannot be clearly wrong or manifestly erroneous, and a reviewing court may not substitute its own line of reasoning even if convinced that it would have weighed the evidence differently. The Louisiana Supreme Court violated petitioners' Fourteenth Amendment Due Process Rights when it did not comply with traditional procedure in its reversal of the judgment against the state.

This Court should grant Certiorari to review the Louisiana Supreme Court's divided 2-3-2 decision reversing the judgment of the Second Circuit Court of Appeal. The Louisiana Supreme Court in disregard of its own standard of appellate review, made a *de novo* factual finding ignoring the provisions of the standard of appellate review, primarily, that where there are two permissible views, the factfinder cannot be clearly wrong or manifestly erroneous; and then proceeded to substitute its own line of reasoning and inferences in reversing the judgment.

Petitioners requested a rehearing, in which the error was made known to the Louisiana Supreme Court, and properly raised the constitutional questions of due process and equal protection under the law.

The petitioners as citizens of the United States are assured by the United States Constitution that they will not "be deprived of life, liberty, or property, without due process of law." U.S. Constitution amend. XIV. While the

phrase "due process" is not readily subject to concise definition, this Court has made it clear that "due process" commands "fundamental fairness" in judicial proceedings. *Lassiter v. Department of Social Services of Durham City*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981).

> The words "due process of law," when applied to judicial proceedings, "means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights." They require a proceeding which, observing the general rules thus established, follows forms of law appropriate to the case and just to the parties to be affected; and which, whenever it is necessary for the protection of the parties, gives them an opportunity to be heard regarding the justice of the judgment sought.

Endicott-Johnson Corp. v. Encyclopedia Press, Inc., 266 U.S. 285, 288, 45 S.Ct. 61, 62 (1924).

Louisiana courts recognize the fact that **duty is a question of law.** *Faucheaux v. Terrebonne Consolidated Government*, 116 So.2d 289 (La. 1993); *Harris v. Pizza Hut of La., Inc.* 455 So.2d 1364, 1371 (1984), and that **breach of duty is a question of fact.** *Annis v. Shapiro*, 517 So.2d 1237 (La. App.4th Cir. 1987); *Chavez v. Noble Drilling Corporation*, 567 F.2d 287 (5th Cir. 1978); *see also Mundy v. Dept. of Health & Human Res.*, 620 So.2d 811 (La. 1993).

In accordance with the jurisprudential standard of appellate review, before a factfinder's verdict may be reversed, there must be evidence within the record such that a reasonable factual basis does not exist for the

verdict (or judgment), and the record establishes the verdict manifestly erroneous. *State Dep't of Transp. & Dev. v. Schwegmann Westside Expressway, Inc.*, 95-1261, 669 So.2d 1172 (La. 3/1/96); 1996 WL 92080, citing *Stobart v. State Through Dep't of Transp. & Dev.*, 617 So.2d 880 (La. 1993). **Conversely**, where two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly wrong. Reasonable inferences of fact should not be disturbed upon review even though the appellate court may feel that its own evaluations and inferences are as reasonable. *Rosell v. ESCO*, 549 So.2d 840 (La. 1989); *Arceneaux v. Domingue*, 365 So.2d 1330 (La. 1978); *Canter v. Koehring*, 283 So.2d 716 (La. 1973).

The rationale for this rule is clear. As the Louisiana Supreme Court explained over twenty years ago, "[t]he reason for this well-settled principle of review is based **not only** upon the trial court's better capacity to evaluate live witnesses (as compared with the appellate court's access to a cold record), **but also** upon the proper allocation of trial and appellate functions between the respective courts." *Canter v. Koehring Co.*, 283 So.2d 716 (La. 1973) (emphasis added); *accord Virgil v. American Guar. and Liab. Ins. Co.*, 507 So.2d 825 (La. 1987).

The jurisprudentially driven rule, the standard of appellate review not only applies to a court of appeal's review of a trial court's factual findings but also to the Supreme Court's review of the factual findings of **any** lower court, be it the trial court **or the court of appeal**. As explained by Chief Justice Calogero:

> This state's appellate review standard, which is **constitutionally based and jurisprudentially**

> **driven,** is that a court of appeal may not overturn a judgment of a trial court absent an error of law or a factual finding which is manifestly erroneous or clearly wrong. Accordingly, appellate courts are charged with a duty to affirm the trial court's decision absent error of law or a factual finding which is manifestly erroneous or clearly wrong.
>
> Rule X of the Supreme Court rules does not include, as one of the suggested grounds for the granting of a writ application, review by this Court of issues involving simply factual determinations. Thus, this Court will not ordinarily grant a writ application involving only the correctness of the factual conclusions of the factfinder. However, this court will grant a writ application involving factual determinations where the Court of Appeal has committed an error of law (such as where the appellate court articulated the manifest error-clearly wrong standard incorrectly, or misapplied or ignored the standard) or where justice requires it. Nevertheless, more often than not this Court does not grant writs involving factual issues only.

Stobart v. State Through Dep't of Transp. & Dev., 617 So.2d 880, 882 fn.2 (La. 1993) (emphasis added). Thus the Supreme Court, like the courts of appeal, may not overturn the factual findings of the factfinder (whether it be the trial court or the appellate court) in the absence of an error of law.

It is well established that the Supreme Court will not disturb the judgment of the lower court on questions of fact unless there is manifest error. *State ex rel. Theriot v. Pulling*, 209 La. 871, 25 So.2d 620 (La. 1946); *Jones v.*

Blossman, 209 La. 530, 25 So.2d 85 (La. 1946); *American Guaranty Co. v. Sunset Realty & Planting Co.*, 208 La. 772, 23 So.2d 409 (La. 1945); *Davis v. Teche Lines*, 200 La. 1, 7 So.2d 365 (La. 1942); *Ludeau v. Stromer*, 199 La. 842, 7 So.2d 70 (La. 1942).

In the Louisiana Supreme Court's opinion in petitioners' case, only the two-justice majority (Justices Victory and Marcus) found that the appellate court had committed "legal" error in its finding a duty. The remaining five members of the panel (Justice Lemmon with Chief Justice Calogero and Justice Kimball concurring; Justices Watson and Johnson dissenting) found no legal error. The concurring justices found no breach of duty, which is a factual finding. Given that the overwhelming majority of the Court found no legal error, it is clear that had the Louisiana Supreme Court not abandoned or ignored the long standing standard of appellate review of factual findings, the judgment of the Second Circuit, Court of Appeal would have been affirmed.

The Louisiana Supreme Court has denied petitioners due process and equal protection guaranteed by the Fourteenth Amendment of the U.S. Constitution and Article I Sections (2) and (3) of the Louisiana Constitution.

III. The Louisiana Supreme Court has violated petitioner's Fourteenth Amendment Due Process and Equal Protection Rights and those Rights as granted by Article 1 Secs. 2 and 3 of the Louisiana Constitution. When a person has suffered injury for which the injured party has a cause of action, such a cause of action is a vested property right. State action which denies due process and equal protection is prohibited and judicial action may be state action.

Where an injury has occurred for which the injured party has a cause of action, such cause of action is a vested property right which is protected by the guarantee of due process under U.S. Const. amend. XIV and La.Const. art. I sec. (2); *See Reichenphader v. Allstate Ins. Co.*, 402 So.2d 311 (La. App. 4th Cir. 1981), *writ granted*, 404 So.2d 1261, *affirmed*, 418 So.2d 648; *Burmaster v. Gravity Drainage Dist. No. 2*, 366 So.2d 1381, at 1387. *See also Gibbes v. Zimmerman*, 290 U.S. 326, 54 S.Ct. 140, 78 L.Ed. 342 (1933).

The Louisiana Constitution Article 1 Sec. 2 provides:

> "No person shall be deprived of life, liberty, or property, except by due process of law."

The right to recover damages for an injury is a property right which cannot be denied without due process of law. *Foster v. Hampton*, 352 So.2d 197 (La. 1977). The protection of individuals against arbitrary government action is the great purpose of the due process clause. *Wilwording v. Swenson*, 502 F.2d 844 (5th Cir. 1974), *cert. denied*, 95 S.Ct. 835, 420 U.S. 912, 42 L.Ed. 843, *on remand*, 405 F. Supp. 447.

The Supreme Court of Louisiana established the well settled standard of appellate review many years ago and has steadfastly adhered to this standard of review, however in this case against the state, that Court has arbitrarily abandoned and/or ignored this judicial procedure in its reversal of the judgment of the lower court awarding compensatory damages against the state. The Louisiana Supreme Court has made such a radical departure from the accepted and usual course of judicial proceedings that an exercise of this Court's supervisory power is required. *See* Sup. Ct. R. 10 (1995). The Louisiana Supreme Court refused to reconsider its ruling after being made aware of its error. This is an abuse of petitioners' rights. This Court should grant the petitioners' writ to assure petitioners' rights of due process and equal protection.

The Due Process Clause of the Fourteenth Amendment was intended to prevent government from abusing its power, or employing it as an instrument of oppression. *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992)

Prior to and subsequent to the ruling in petitioners' case, the Louisiana Supreme Court has consistently and steadfastly indicated its intention to hold fast to the jurisprudentially driven rule of appellate review. Therefore, the Louisiana Supreme Court has no intention of breaking away from the traditional procedure for appellate review. The break from the standard apparently applies to this single case. This action by the State Supreme Court deprives the petitioners of both their right to due process and their right to equal protection of the law.

State Courts bear equal responsibility with Federal Courts to guard against and protect rights secured by the Constitution of the United States. *Horn v. O'Cheskey*, 387 F. Supp. 1280 (D.C.N.M. 1974). State action which denies equal protection is prohibited and judicial action may be state action. Judicial action in private disputes is a form of state action required for application of the due process clause prohibiting the state from denying equal protection of its laws to any person. *Hosey v. Club Van Cortlandt*, 299 F. Supp. 501 (D.C.N.Y. 1969).

A state or governmental body violates due process when it fails to follow procedural steps it has adopted for proceedings held before it. U.S. Const. amend. XIV, *Whiteside v. Kay*, 446 F. Supp. 716 (W.D.La. 1978).

In addition, the Louisiana Supreme Court has violated the rights of the petitioners as guaranteed by Article I, Section 3 of the Louisiana Constitution which provides:

> "No person shall be denied equal protection of the laws."

The basic doctrine of equal protection is to guarantee that all persons in similar circumstances will be treated similarly. *Smith v. Dison*, 662 So.2d at 94 (La. App. 4th Cir. 1995).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GREGORY P. MASSEY, ESQ.*
1301 Common Street
Post Office Box 3148
Lake Charles, La. 70602
(318) 439-2774

*Counsel of Record

APPENDIX A

95-1466, 95-1487 (La. 5/10/96)

Earl Garland PITRE, Jr., et al.

v.

LOUISIANA TECH UNIVERSITY, et al.

Nos. 95-C-1466, 95-C-1487.

Supreme Court of Louisiana.

May 10, 1996.

University student who was paralyzed in sledding accident on campus, and his parents, sued university and board of trustees for state colleges and universities. The Third Judicial District Court, Parish of Lincoln, granted summary judgment for defendants, and plaintiffs appealed. The Court of Appeal, 596 So.2d 1324, reversed and remanded, and review was denied, 604 So.2d 998. Following judgment for defendants after trial on the merits, plaintiffs appealed, and the Court of Appeal reversed and awarded damages, 655 So.2d 659, and applications for writs of certiorari were granted. The Supreme Court reversed, with an opinion by Victory, J., holding that the university had no duty, and a concurring opinion by Lemmon, J., holding that there was no breach of duty.

Reversed.

Calogero, C.J., and Kimball, J., concurred for reasons assigned by Lemmon, J.

Watson, J., dissented and assigned reasons.

Johnson, J., dissented.

William Craig Henry, Hudson, Potts & Berstein, Richard P. Ieyoub, Attorney General, for Applicant in No. 95-C-1487.

Mack E. Barham, Robert Elton Arceneaux, Gail N. Wise, Barham & Arceneaux, Gregory P. Massey, Jones, Tete, Nolen, Hanchey, Swift & Spears, for Respondent in No. 95-C-1487.

VICTORY, Justice.

This personal injury case based upon alleged negligence arises out of a sledding accident that occurred on the campus of Louisiana Tech University ("Tech") during a rare winter ice and snow storm. The plaintiff, Earl Garland Pitre, Jr., sustained serious spinal injuries and paralysis when the plastic garbage can lid that he was sledding upon collided with the concrete base of a light pole located in a campus parking lot. We granted writs to examine whether Tech had a duty to warn of the associated risks and/or to protect against injury. Under the circumstances, we find that Tech had no duty since the light pole was obvious and apparent and the risks of colliding with it while sledding are known to everyone.

FACTS

In early January of 1988 a winter storm was forecast for northeast Louisiana. In anticipation of the storm, the Housing Department at Tech distributed the following bulletin to all of its dormitory residents[1]:

---

[1] Hereinafter referred to as the "Winter Storms Bulletin."

WINTER STORMS AND LOUISIANA TECH

The Housing Office would like to pass on to each resident some helpful information all students should find beneficial during winter storm conditions on campus.

We encourage all students to dress warmly when ice or snow is on the ground. *We discourage* hypothermia, frostbite, etc., all realities during winter storms, but not *pleasant realities.*

We encourage **snowmen, sledding, etc., in proper areas and using good judgement.** ***We discourage*** **sledding down the hills along Tech Drive into the path of oncoming cars – not good judgement – nor is being dragged behind a moving vehicle considered using good judgement. Fifteen reported personal injuries were associated with such behavior during the last snow.**

We encourage students to get outdoors and enjoy these rare occasions on Tech Campus when everything is blanketed in white. *We discourage* rowdy and disruptive behavior such as throwing snow/ice balls at passing cars and dorm windows. We had numerous broken car windshields and residence hall windows during our last snow – damages which cost all students.

We encourage groups of students or even entire halls to walk around the campus and surrounding area to view the beauty and spectacle. *We discourage* students driving during this time. Our accident rate on campus was up several hundred percent during our last snow.

We encourage students to be particularly aware of the special conditions existing during winter storms – e.g.,

hazardous driving conditions; certain streets and roads closed due to icy conditions; and ice on steps and sidewalks making footing precarious. *We discourage any* and *all* behavior unbecoming of a college student –

In addition we encourage students who *must* drive or walk during winter storm conditions to note the following tips:

How to Go in Snow

Skids – Take your foot off the gas; do not brake. For rear-wheel skids, turn the steering wheel in the same direction as the skid. For front-wheel skids, do not turn the steering wheel until traction is regained and you regain control.

Stopping Suddenly – Slow gradually by pumping the brakes several times; do not brake sharply.

Stuck in Snow – Clear snow from around all tires and find something to help traction. It's good to carry traction mats or some wire mesh for this purpose. Or you can use *dry* sand, or ashes.

Icy Hills – Going up: maintain a steady speed. If wheels begin to spin, ease up on the gas pedal, then reaccelerate slowly. Going down: brake gently to reduce speed.

Using Snow Tires and Chains – Keep snow tires inflated to the recommended maximum. For best results, place snow tires or chains on all four wheels.

> When Walking – Use warm shoes or boots which repel water and have good grips/soles. (Underline in original. Bold added.)

As predicted, a rare winter storm did occur on January 6-7, 1988. The entire Tech campus was covered with ice and snow, and classes scheduled for January 7 were canceled. Because of the conditions, many of the 3,406 students residing in Tech dormitories were unable to leave the campus. A number of these students took advantage of the unique opportunity by engaging in sledding, an infrequent activity on Tech's campus and for most Louisiana residents.

Among those was 20-year-old Earl Garland Pitre, Jr. ("Pitre"), a native of Lake Charles, Louisiana, who was in his third year at Tech. On the evening of January 7, 1988, Pitre walked from his room at Neilson Dormitory through a parking lot between the Thomas Assembly Center and the Joseph Aillet Football Stadium to attend a Tech basketball game at the Assembly Center. When the game ended at approximately 9:00 p.m., Pitre walked back through the same parking lot to his room and made a few telephone calls. After visiting with fellow dormitory resident, Todd Efird, the two walked back to the Assembly Center where they gathered to sled with friends, Paul McCarver, Mark White and David White.

The Assembly Center is located on a hill near the football stadium. At the east and northeast entrances of the Assembly Center, the hill (approximately 15 feet high and 85 feet long from its crest to its base) slopes into the

stadium parking lot.[2] At the other end of the parking lot is the football stadium, which is surrounded by a road and is approximately 143 feet from the base of the hill. Several light poles, spaced about 150 feet apart, are located throughout the parking lot. The poles are secured with concrete bases approximately 1 foot 10 inches in height and 2 feet in diameter.

When Pitre arrived at approximately 11:00 p.m., there were several students sledding down the hill into the stadium parking lot using various devices, including, cardboard, a toilet seat, plastic advertising signs, food trays, baking trays, part of a rocking chair, and home-made sleds. Initially, Pitre made three trips down the hill on a piece of cardboard. He then began sledding on a large plastic garbage can lid approximately five to six feet wide, which had been brought from off-campus. The lid was more desirable because it held up to four riders, and went faster and farther than any of the other devices. On several occasions the lid traveled as far as the stadium, over 224 feet.

This tragic accident occurred during Pitre's eighth trip down the hill on the lid. Pitre mounted the lid with three other individuals, Allyson Hines, Johanna Broussard and John Dumond. These riders (including Pitre) described their assumed positions as lying side-by-side on their backs with their feet facing uphill and their

---

[2] This is the same parking lot which Pitre walked through to get to and from the Assembly Center.

heads facing downhill.[3] The lid was then pushed from the top of the hill by Paul McCarver. As it proceeded down the hill into the football stadium parking lot, the lid collided with the concrete base of one of the light poles. As a result, Pitre sustained head and back injuries resulting in permanent paralysis from the mid-chest down.

PROCEDURAL HISTORY

On December 30, 1988, Pitre and his parents, Earl G. Pitre, Sr. and Joan Pitre, filed suit against Tech and the State of Louisiana. They alleged that Tech was negligent in the following respects: (1) encouraging students, by way of the Winter Storms Bulletin, to engage in sledding activities in areas which Tech knew or should have known were hazardous; (2) failing to erect cushions around solid objects to prevent sledding injuries; (3) failing to warn students of the hazards which might be encountered in the area in which sledding took place; and (4) failing to prohibit sledding in the area where the accident occurred.

On November 28, 1990, the defendants moved for summary judgment claiming that Tech had no duty to Pitre. On December 5, 1990, the plaintiffs also moved for summary judgment. The trial court granted the defendants' motion, finding that the danger of striking a fixed

---

[3] One witness to the accident, Arla Caldwell, described the riders' positions differently. She recalled them sitting one behind the other with each rider straddling the rider in front of him or her. However, her description was consistent with that of the riders as she also recalled that they traveled with their feet facing uphill (i.e., backwards).

object while sledding was obvious and apparent. Accordingly, the trial court held that Tech had no duty to warn, that the Winter Storms Bulletin did not create an affirmative duty, and that there was no duty to place cushions around the light poles.

On appeal, a narrow majority of the Louisiana Second Circuit Court of Appeal reversed and remanded. *Pitre v. Louisiana Tech University*, 596 So.2d 1324 (La.App.2d Cir.1991).[4] According to the court of appeal, Tech's general duty as a landowner, to discover unreasonably dangerous conditions or uses of its premises and to either correct or warn of their existence, was heightened by its relationship with Pitre as a dormitory resident and student. Relying upon *Fox v. Board of Supervisors of Louisiana State University*, 576 So.2d 978 (La.1991), the court of appeal acknowledged that adult students must be held responsible for their own conduct, and that Tech could not practically control all on-campus activities. However, the court of appeal concluded that Tech could not "abandon all efforts to insure the physical safety of its students" because "parents, students and the general community have some expectations that reasonable care will be exercised to protect students from foreseeable harm." Citing *Socorro v. City of New Orleans*, 579 So.2d 931 (La.1991), the court of appeal also reasoned that it was not proper to focus solely upon Pitre's knowledge and conduct when examining whether Tech had a duty.

---

[4] Initially, the summary judgment was affirmed by Judges Sexton and Lindsay, with Judge Brown dissenting. On rehearing, it was reversed by Judges Norris, Brown and Stewart, with Judges Sexton and Lindsay dissenting.

The court of appeal found that Tech knew that the students would be using this hill for sledding; that Tech was aware, through the campus Police Department which had stopped sledding on campus hills, of the specific danger presented by the light poles; and that through the Winter Storms Bulletin, Tech "encouraged" Pitre, a 20-year-old student without prior sledding experience, to undertake the risk. According to the court of appeal, these circumstances created "an illusion of safety" which removed or lessened Pitre's reality of the actual danger, and gave Tech the duty to protect or warn against this unreasonably dangerous activity.[5]

The defendants requested review of the court of appeal's decision, which this Court denied, stating: "Review of the court of appeal's denial of defendant's motion for summary judgment is not warranted at this state of the proceeding." *Pitre v. Louisiana Tech University,* 604 So.2d 998 (La.1992).

After trial on the merits, the trial court issued a lengthy opinion wherein it again found that Tech owed no duty to Pitre. On appeal, the trial court's decision was reversed. *Pitre v. Louisiana Tech University,* 26388 (La.App.2d Cir. 5/10/95); 655 So.2d 659 (Hightower, J., dissenting). The court of appeal refused to address the duty issue, finding that its prior decision was law-of-the-case and that the trial court legally erred by revisiting the duty issue on remand. The court of appeal found that the

---

[5] In so finding, the court of appeal did not sustain the plaintiffs' motion for summary judgment, but merely reversed the trial court's ruling sustaining the defendants' motion for summary judgment.

duty issue became final when this Court denied writs. Upon considering the elements of breach and causation, the court of appeal concluded that Pitre was 75% at fault in causing the accident. Pitre was awarded the following damages, subject to reduction: $2,500,000.00 in general damages; $128,770.87 in past medical expenses; and $1,163,831.00 in future medical expenses. Pitre's parents were each awarded $35,000.00 (subject to reduction) for loss of consortium.

We granted the plaintiffs' and the defendants' respective applications for writs of certiorari. Under the facts presented, we find that sledding is not inherently dangerous, the light pole was patently obvious and apparent to all, and that the hazards of colliding with fixed objects while sledding are well-known. As such, the light pole did not present an unreasonably dangerous condition, and Tech had no duty to warn of the condition or protect against the obvious risks associated with sledding down a hill in the direction of a light pole.[6]

LAW OF THE CASE

Preliminarily, we observe that the principle of law-of-the-case has no bearing upon our decision today. Under this doctrine, courts of appeal generally refuse to reconsider their own rulings of law on a subsequent appeal in

---

[6] This finding renders the plaintiffs' assignments of error relating to comparative fault and damages moot. Our decision also moots the issues raised in the defendants' supplemental brief regarding the revival of La.R.S. 13:5106 and 5112 by the 1995 amendment to La. Const. art. XII, § 10(C). See, 1995 La.Acts Nos. 828 and 1328.

the same case. However, the law-of-the-case principle is not applied to prevent a higher court from examining the correctness of the ruling of an intermediate appellate court. *Day v. Campbell-Grosjean Roofing & Sheet Metal Corp.*, 260 La. 325, 256 So.2d 105, 107 (1971).

This Court has not previously decided any of the issues presented, including whether Tech owed a duty to Pitre. The Court's denial of the defendants' request for review of the court of appeal's reversal of summary judgment has no precedential value, and should in no way be construed as an adoption of the court of appeal's ruling or reasoning. *St. Tammany Manor, Inc. v. Spartan Building Corp.*, 509 So.2d 424 (La.1987).

NEGLIGENCE & DUTY-RISK ANALYSIS

Tech's potential liability is predicated upon the concepts of fault and negligence under La.Civ.Code arts. 2315 and 2316, which make all persons responsible for damages caused by their "negligence." In order to determine whether liability exists under the facts of a particular case, this Court has adopted a duty-risk analysis.[7] This analysis takes into account the conduct of each individual party and the peculiar circumstances of each case. *Socorro*, 579 So.2d at 938. The relevant inquiries are:

---

[7] See *Hill v. Lundin & Associates, Inc.*, 260 La. 542, 256 So.2d 620 (1972); *Dixie Drive It Yourself System v. American Beverage Company*, 242 La. 471, 137 So.2d 298 (1962). See also, Robertson, *Reason Versus Rule in Louisiana Tort Law: Dialogues on Hill v. Lundin & Associates, Inc.*, 34 La.L.Rev. 1 (1973); Crowe, *Anatomy of a Tort – Greenian, As Interpreted by Crowe Who Has Been Influenced by Malone – A Primer*, 22 Loy.L.Rev. 903 (1976).

> (1) Was the conduct of which the plaintiff complains a cause-in-fact of the resulting harm?
>
> (2) What, if any, duties were owed by the respective parties?
>
> (3) Whether the requisite duties were breached?
>
> (4) Was the risk, and harm caused, within the scope of protection afforded by the duty breached?
>
> (5) Were actual damages sustained?

Socorro, 579 So.2d at 938-39 (citations omitted).

If the plaintiff fails to satisfy one of the elements of duty-risk, the defendant is not liable. Because we find that Tech had no duty under the facts of this case, we pretermit discussion and consideration of the remaining elements.

DUTY

A landowner owes a plaintiff a duty to discover any unreasonably dangerous condition and to either correct the condition or warn of its existence. *Socorro*, 579 So.2d at 939, citing *Shelton v. Aetna Casualty & Surety Company*, 334 So.2d 406, 410 (La.1976). It is the court's obligation to decide which risks are unreasonable, based upon the facts and circumstances of each case. *Harris v. Pizza Hut of Louisiana, Inc.*, 455 So.2d 1364, 1371 (La.1984). Whether a particular risk is unreasonable is a difficult question which requires a balance of the intended benefit of the thing with its potential for harm and the cost of prevention. *Socorro*, 579 So.2d at 939, citing *Landry v. State*, 495

So.2d 1284, 1288 (La.1986); *Entrevia v. Hood*, 427 So.2d 1146 (La.1983).

In making this determination in negligence actions, the "obviousness" and "apparentness" of the complained of condition have historically been taken into consideration.[8] In *Shelton, supra*, the plaintiff sought damages for injuries she sustained after slipping in the yard of her son's property. Pursuant to a usufruct granted to them by their son, the plaintiff and her husband lived in an apartment adjacent to the son's home. On the morning of the accident the plaintiff's son washed a garage on the property, using a mixture of lime, baking soda and water. Later that evening, the plaintiff slipped upon a small residual patch of the mixture as she was walking from the apartment to a nearby swing. She sued her son's homeowner's liability insurer, claiming negligence. This Court found that no duty existed because the residual mixture did not present an unreasonable risk of harm. In so finding, the Court observed:

> [T]he proper test to be applied in determining a landowner's liability under articles 2315 and 2316 of the Civil Code is " 'whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others,' ". . . . The duty of a landowner is not to insure against the possibility of an accident on his premises, but rather to act reasonably in view of the probability of injury to others. Thus

---

[8] These considerations are also relevant in products liability actions. La.R.S. 9:2800.57(B). See also Maehler, *Note, Glittenberg v. Doughboy Recreational Industries: The "Open and Obvious Danger" Rule*, 1993 Det.C.L.Rev. 1357 (Fall, 1993).

> the landowner is not liable for an injury resulting from a condition which should have been observed by an individual in the exercise of reasonable care or which was as obvious to a visitor as to the landowner.

Shelton, 334 So.2d at 410 (citations omitted).

This test was reaffirmed in *Murray v. Ramada Inns, Inc.,* 521 So.2d 1123 (La.1988). There, the decedent sustained fatal injuries after striking his head upon the bottom of a Ramada Inn swimming pool while diving. His wife and children instituted a wrongful death action against the companies that franchised, owned and operated the motel, and their respective liability insurers, alleging liability based on negligence and strict liability. Upon certification from the U.S. Fifth Circuit Court of Appeal, this Court held that the absolute defenses of assumption of the risk and contributory negligence were no longer viable as they had been subsumed by comparative fault principles.

The defendants raised a subsidiary argument independent of the defenses of assumption of the risk and contributory negligence. They contended that they were not liable to the plaintiffs because they had no duty to protect the decedent from a danger of which he had knowledge (i.e., diving into shallow water). The Court rejected the defendants' argument finding:

> If accepted, defendants' argument would inject the assumption of risk doctrine into duty/risk analysis "through the back door." By that, we mean that the argument attempts to define the defendant's initial duty in terms of the plaintiff's actual knowledge, and thereby seeks to

> achieve the same result which would be reached if assumption of risk were retained as a defense, i.e., a total bar to the plaintiff's recovery.
>
> A defendant's duty should not turn on a particular plaintiff's state of mind, but instead should be determined by the standard of care which the defendant owes to all potential plaintiffs. *See* Robertson, *supra*, 44 La.L.Rev. at 1378.

Murray, 521 So.2d at 1136.

Continuing, the Court differentiated between the defendants' argument regarding the plaintiff's subjective knowledge of the danger, and the potential argument that a duty is not owed when the complained of condition is obvious and apparent to all:

> Again, this is not to say that a duty is owed or breached in all situations that involve injury. We have held, for example, that the duty which a landowner owes to persons entering his property is governed by a standard of reasonableness, and that a potentially dangerous condition that should be obvious to all comers is not, in all instances, *unreasonably* dangerous. *See, e.g., Shelton v. Aetna Casualty & Surety Co.*, 334 So.2d 406, 410-11 (La.1976). However, the key to a finding of no liability in such cases is not the plaintiff's subjective awareness of the risk, but the determination that the defendant did not act unreasonably vis-a-vis the plaintiff, or injure the plaintiff through the instrumentality of an unreasonably dangerous thing in his custody. The determination of what the plaintiff knew regarding the risk of injury is made after fault on the part of the defendant has been established, and is governed by the comparative fault

> principles ennunciated [sic] in La.Civ.Code art. 2323. (Italics in original.)

Murray, 521 So.2d at 1136.

Thus, the obviousness and apparentness of a potentially dangerous condition are relevant factors to be considered under the duty-risk analysis. If the facts of a particular case show that the complained of condition should be obvious to all, the condition may not be unreasonably dangerous and the defendant may owe no duty to the plaintiff. *Socorro*, 579 So.2d at 942, citing *Murray*, 521 So.2d at 1137.

APPLICATION OF THE LAW TO THE FACTS

Utility of the Light Pole

We begin our analysis by examining the utility of the light pole. Clearly, the poles were erected to support the lights that illuminated the stadium parking lot. By necessity, the poles were systematically spaced throughout the parking lot to provide uniform lighting throughout. The affidavit of Bill Cox, the Director of Athletic Facilities, indicates that the parking lot lights were automatically programmed to turn on every evening at 7:00 p.m. and off every morning at 1:00 a.m. For evident safety reasons, providing adequate lighting for users of the parking lot, including both pedestrians and motorists, is of great interest to Tech and the public at large. As such, we find that the light poles serve an important public interest and are of great utility.

Likelihood and Magnitude of Harm: Obviousness and Apparentness

With this in mind, we next study the likelihood and magnitude of the harm. It is here that the obviousness and apparentness of the complained of condition should be considered, since it is improbable that a potentially dangerous condition which is observable to all will cause injuries to an individual who exercises reasonable care.

The trial court decided on two separate occasions (the motion for summary judgment and the trial on the merits) that the area was well-lit on the evening of the accident, and that the light pole was "readily observable" or "clearly visible" by those engaged in sledding that night. After examining the evidence, we conclude that the trial court was correct in this determination.

The depositions of numerous individuals sledding on the Assembly Center hill when the accident occurred were introduced into evidence. Pitre's three fellow riders overwhelmingly agreed that the parking lot was well-lit on the evening of the accident, and even acknowledged that sledders had hit fixed objects during prior trips down the hill. Allyson Hines testified that all of the lights in the parking lot were lit on the evening of the accident, including the light on the pole that Pitre hit. She remembered seeing the lid travel as far as the stadium. Johanna Broussard recalled that the hill was lit well enough to see from the top of the hill to the stadium, and that all of the light poles in the parking lot could be seen from the hill. She stated that at least twice she observed riders on the lid hit the stadium and/or the stadium fence. Similarly, John Dumond recollected that the light on the pole that

Pitre hit was lit, and that you could see the light pole from the top of the hill. He even remembered seeing others slide past the light poles while riding on the lid.

The testimony of the group of friends that Pitre was sledding with was consistent with that of those riding on the sled with Pitre when the accident happened. Paul McCarver, from Arkansas, stated that the sky was clear on the night of the accident, and that there was plenty of light on the hill. He recalled sledding past the light poles all of the way to the stadium. He also stated that everyone sledding on the hill should have been aware of the light poles, despite the lack of any prior sledding experience. Mark White, also of Arkansas, testified that there was plenty of light on the parking lot, and that you could see the light poles. Mark's brother, David, described the lighting as "pretty bright," and recalled being able to see the pole that Pitre hit. He also stated that it occurred to him that he could injure himself by hitting one of the light poles because he had previously struck the stadium and a pole near the stadium.

Another group of sledders that witnessed the accident also uniformly testified that the light pole was observable. Arla Caldwell stated that the area was well-lit, and that she could see the pole that Pitre struck from where she was standing on the top of the hill. She recalled that on some occasions sledders slid within three to six feet of the pole that Pitre hit. She also stated that sledders had traveled as far as the fence surrounding the stadium. Cedric Champeaux concurred. He testified that the parking lot was well-lit, and remembered that the parking lot lights were on. He noticed all of the light poles in the area of the parking lot where his group was

sledding, including the pole that Pitre hit. He specifically stated that he was "watching" these light poles because he was concerned about colliding with them. Renee Goldman remembered that she considered sledding on the lid to be dangerous because it slid as far as the stadium fence. Renee's husband, James, also recognized the danger. He stated that he saw the lid hit the stadium fence a couple of times. He also testified that he perceived the light poles as being more of a danger because he saw sledders on the lid come within two feet of hitting them on a couple of occasions.

As further evidence of the lighting conditions, we observe that at least two persons on the hill that evening stated that they attempted to warn Pitre and the other three sledders of the impending collision as the lid approached the base of the pole. Paul McCarver stated that immediately after he pushed the lid from the top of the hill he could tell that it was not following the same path that it had on prior occasions. He testified that he started "jumping and hollering, trying to warn them that it was going toward the pole." Arla Caldwell, who was also standing on the hill, recalled that approximately two-thirds of the way down the hill it became obvious that the lid was sliding towards the pole, and "everyone began to yell and say, 'Jump,' you know, 'Get off.' " These attempts to warn show that the pole must have been visible from the hill.

This evidence overwhelmingly demonstrates that the parking lot was well-lit, and as the trial court found, that the light pole should have been readily apparent and observable to anyone sledding on the Assembly Center

hill on the evening of the accident. Thus, the likelihood of harm was slim to anyone exercising reasonable care.

In brief, the plaintiffs claim that this case is similar to *Socorro, supra,* wherein this Court held that the defendant had a duty to warn the plaintiff not to dive into a particular area of Lake Ponchartrain because rip rap was shallowly located under the water. The plaintiffs argue that the danger there was no less obvious than here. We disagree. The dangerous condition in *Socorro,* the rip rap, was concealed by water and was not obvious and apparent to all. Here, the dangerous condition was in plain view and should have been seen by all.

Cost to Prevent Harm

The plaintiffs argue that there were numerous methods that Tech could have employed to prevent this accident, including placing warning signs on the hill, posting an officer on the hill and erecting barriers around the light poles (e.g., bales of hay or cushions).

While these proposed means for preventing sledding and protecting against the accident are feasible, they were not necessary in light of the low likelihood of injury if sledders used good judgment and exercised reasonable care. Again, the potential for injury by sledding into a fixed object is obvious and apparent. The most effective means of preventing this accident rested with Pitre. To require Tech to take the proposed measures to protect from this obvious and apparent danger would place a huge burden upon the University by requiring it to warn and/or protect against all risks (e.g., buildings, signs, fences, trees, etc.) associated with sledding on campus.

The cost to prevent potential harm by posting signs, officers and/or barriers at every object on campus that one might slide into would be enormous.

Nature of Activity

Finally, we end our inquiry by examining the activity, particularly its social utility and whether it is dangerous by nature. The recreational activity of sledding, while fun, is of minimal social utility. Although it is gratifying to participants, it is voluntary and does not generally benefit society in any substantial way.

Furthermore, the record supports the trial court's conclusion that sledding is not dangerous by nature. Dr. David Nichols, the defendant's expert in campus public safety and law enforcement, compared sledding to skateboarding or biking. In each of these activities it is the manner in which the activity is undertaken that determines the degree of dangerousness.

It is common knowledge that one must be able to steer to avoid colliding with fixed objects while sledding. Despite his familiarity with the campus and the parking lot, Pitre chose to sled, on his back, head first, down a hill on a device over which he had no control. While Pitre claims not to have perceived the danger, if true, he clearly was unreasonable in not doing so and taking simple measures, such as sledding feet first and on a sled not so slippery, to protect himself.

In sum, the light pole is of great social utility, as it serves important safety interests by providing lighting to pedestrians and users of the parking lot. Furthermore, the

likelihood of the harm was minimal since the light pole was obvious and apparent to those sledding on the hill that evening, and the associated risks of colliding with it while sledding were well-known.

The cost of prevention would have been great to Tech. The obviousness and apparentness of the condition made it easy for Pitre to avoid the accident simply by exercising reasonable care to protect himself.

For these reasons, we conclude that the trial court was correct in finding that the condition was not unreasonably dangerous and that Tech had no duty to Pitre.

OTHER ARGUMENTS ADVANCED BY PLAINTIFFS

The plaintiffs argue that special circumstances in this case justify imposing a duty upon Tech. They contend that Tech acknowledged the hazards of sledding through an unwritten no-sledding policy which the Tech Police Department adhered to and implemented by stopping sledding on numerous campus hills, including the Assembly Center hill where Pitre was injured. Despite this acknowledgment, Tech distributed the Winter Storms Bulletin which, according to plaintiffs, encouraged students to sled in *every* area of the campus (safe or unsafe), except around Tech Drive. Finally, the plaintiffs argue that the "no-sledding" policy and the Winter Storms Bulletin, combined with Pitre's status as a student and dormitory resident, made it more likely that Pitre would be injured, thereby imposing upon Tech the duty to warn or prevent the accident.

Police Policy

It is undisputed that some Tech Police Officers stopped some sledding on campus. The plaintiffs assert that this Departmental practice established a University-wide policy, which the administration of Tech was obligated to monitor and regulate, and that this policy constituted a recognition by Tech that sledding was hazardous.

The trial court held that Tech did not have a departmental policy regarding sledding in general, but would stop it on a case-by-case basis depending on the individual officer and the situation. The record supports this finding. Glenn Theis, the acting Director of the Housing Department at the time of the accident, stated that there was no University policy regarding sledding when the accident occurred. This was confirmed by Jean Hall, who was appointed to be the Vice-President of Student Affairs days after the accident. Additionally, Dr. David Nichols, the defendants' expert in campus public safety and law enforcement, testified that to establish a University policy, certain procedural steps must be taken, such as promulgation from the administration, approval, incorporation into a written reference book and dissemination.

Furthermore, the deposition testimony of the majority of the officers which was introduced at trial also supports the trial court's conclusion. Chief Steven Quinnelly, a Detective at the time of the accident, stated that the object was to stop unsafe activity, including sledding into dangerous areas like Tech Drive or parking lots. Sergeant Bobbie Merritt agreed. He testified that, "If there was ice on there [the Thomas Assembly Center

parking lot] and they were sliding down and it looked like it was dangerous, which the majority of the time it was because there were people down their driving in the lots and all, too, then we would stop them," and "The only places I ever stopped anybody [from sledding] is when I felt it was unsafe for them and I would say something to them." In similar fashion, Sergeant John R. Bennett, the shift supervisor on the evening of the accident and one of the officers dispatched to the scene, stated that officers were not directed by their superiors to stop sledding in certain areas. Rather, they were to use their discretion if they thought the sledders might hurt themselves. Sergeant Debra White concurred. She testified that officers were to stop potentially dangerous sledding, such as into streets.

Therefore, the Department policy did not constitute an acknowledgment by Tech that sledding is an inherently dangerous activity. Rather, by its application to dangerous sledding only, it bolsters our prior conclusion that an ordinarily harmless activity, such as sledding, biking, skateboarding, etc., may become dangerous if undertaken in an unsafe manner.

The plaintiffs contend that Tech is liable because it knew of the danger of sledding on the Assembly Center hill. As support, they point to the testimony of several of the officers who stated that they stopped sledding on the Assembly Center hill because they considered it to be dangerous. Again, this does not constitute an acknowledgment that sledding is inherently dangerous. The perceived danger was not the sledding itself, rather, the officers feared injury due to the manner in which the sledding was being conducted, including the fear that

students were not taking the proper precautions to prevent known risks like striking fixed objects which were in plain view. There is no evidence to suggest that Tech had any more knowledge of the danger than Pitre or anyone else who chose to sled down the hill at the Assembly Center.

Winter Storms Bulletin

With regard to the Winter Storms Bulletin, we agree with the trial court's conclusion that, "[i]t was not a blanket sanction of all sledding in any area, and under any circumstances." The information and warnings contained in the Winter Storms Bulletin that was distributed by Tech's Housing Department were consistent with the approach taken by the Police Department. The language therein specifically provided that the University encouraged sledding, but warned of sledding only "in proper areas and using good judgment." By definition, this meant that students may sled, but that they should exercise care when doing so.

In fact, the Winter Storms Bulletin even gave students some direction in this area, by providing: "*We discourage* sledding down the hills along Tech Drive into the path of oncoming cars – not good judgement – nor is being dragged behind a moving vehicle considered using good judgement." By its terms, this portion of the Winter Storms Bulletin was intended by the University to provide examples or illustrations of what was not considered to be good judgment.

The plaintiffs claim that Pitre relied upon the Winter Storms Bulletin in his decision to sled, and that he construed it as University approval of sledding on any hill except along Tech Drive. Yet the record supports the trial court's finding that, "the winter storms bulletin was not the impetus which began this particular activity." Pitre alone testified that the Winter Storms Bulletin prompted him to go sledding that night.[9] None of the other students stated that they relied upon the Winter Storms Bulletin. In any event, even if Tech had sanctioned sledding on the Assembly Center hill and Pitre relied upon it, the obligation to use good judgment remained with him. This included the responsibility of preventing injury by observing and avoiding obvious fixed obstacles, such as the light pole, and by not riding backwards, upside-down, on a non-steerable garbage can lid in the direction of the pole.

The plaintiffs also claim that Tech assumed an affirmative duty to warn or prevent this accident by issuing the Winter Storms Bulletin and because its police officers undertook the responsibility of stopping sledding. As support, they rely upon *Harris, supra*, which involved a negligence action against Pizza Hut of Louisiana, Inc., after one patron was injured and one was killed in an armed robbery. The Court found that the defendant assumed a duty to protect its customers from harm by hiring a security guard. In so finding, the Court placed emphasis on the fact that the restaurant had been robbed

---

[9] This testimony conflicted with that given by Pitre during his deposition, wherein he stated that the Winter Storms Bulletin was not a factor in his decision to sled.

repeatedly and that the security guard negligently discharged his duties.

This case is distinguishable from *Harris* because the risk here was obvious to all and Pitre was able to protect himself simply by exercising good judgment as he was sledding down the hill. If we were to adopt the plaintiffs' argument, Tech and many other institutions would be forced to shoulder an insurmountable burden. Consider the remainder of the Winter Storms Bulletin, which warns of well-known dangers associated with cold weather, such as frostbite, hypothermia, walking on icy sidewalks and driving on icy roads. Under the plaintiffs' theory, Tech assumed a duty to protect its students from all of these obvious and apparent risks. Yet we conclude that every college student should know of such dangers, and should take the simple measures necessary to protect himself.

Special Relationship

Finally, the plaintiffs argue that Tech had a duty to Pitre because he was a student and resident at the university. In *Fox, supra,* this Court acknowledged that universities no longer stand in loco parentis to their students, noting that attempts to foster the educational process, and the growth and maturation of students had relieved universities of many of their protective duties. Under the modern university-student relationship, "the college student is considered an adult capable of protecting his or her own interests; students today demand and receive increased autonomy and decreased regulation on and off

of campus." *Fox*, 576 So.2d at 982, citing *University of Denver v. Whitlock*, 744 P.2d 54, 59-60 (Colo.1987).

When the accident occurred Pitre was an adult. We agree with the trial court's finding that, "[t]here are certain activities which the adult of average intelligence knows may be hazardous under certain conditions. Neither the university administration nor the campus police had greater knowledge of the dangers presented by this activity nor of the likelihood of the severity of the harm, than did the students who participated." We find no basis to place a duty upon Tech merely because of its relationship with the injured plaintiff.

CONCLUSION

When deciding whether a condition is unreasonably dangerous, the obviousness or apparentness of the complained of condition is a factor to be considered as part of the likelihood of the harm element. Under the facts of this case, we find that sledding is not inherently dangerous and that the light pole and the danger of sledding down the hill into the pole were obvious and apparent to all on the evening of the accident. Thus, the light pole did not present an unreasonably dangerous condition and Tech had no duty to warn of the apparent danger or take steps to protect against injury. Further, the Tech Police Department's unwritten policy of stopping dangerous sledding, the Housing Department's Winter Storms Bulletin, and the plaintiff's relationship with Tech do not change this conclusion. Since Tech had no duty to Pitre under these facts, the defendants can not be held liable.

DECREE

For the reasons set forth above, the judgment of the court of appeal in favor of plaintiffs, Earl Garland Pitre, Jr., Earl Garland Pitre, Sr., and Joan Pitre, and against Louisiana Tech University and the State of Louisiana, is hereby reversed, and this lawsuit is dismissed at plaintiffs' costs.

REVERSED.

WATSON, J., dissents and assigns reasons.

JOHNSON, J., dissents.

LEMMON, J., concurs and assigns reasons.

KIMBALL, J., concurs for reasons assigned by LEMMON.

LEMMON, Justice, concurring.

In my view, the pivotal issue in the duty-risk analysis in this case is not the existence of a duty, but the breach of duty.

The duty-risk analysis usually focuses on the general duty imposed upon the defendant by statute or rule of law, according to the relationship between the parties and the circumstances of the particular case, and then determines whether there was a breach of that general duty. The statement that "the defendant had no duty," as noted in Professor David W. Robertson et al, *Cases and Materials on Torts* 161 (1989), should be reserved for those "situations controlled by a rule of law of enough breadth and clarity to permit the trial judge in most cases raising the problem to dismiss the complaint or award summary judgment for defendant on the basis of the rule." Thus, a

"no duty" defense generally applies when there is a categorical rule excluding liability as to whole categories of claimants or of claims under any circumstances. In the usual case where the duty owed depends upon the circumstances of the particular case, analysis of the defendant's conduct should be done in terms of "no liability" or "no breach of duty."

Here, the defendant had a duty to act reasonably in view of the foreseeable risks of danger to students resulting from the winter storm. As noted by the majority, the defendant did act reasonably under the circumstances. The defendant warned students by means of the Winter Storms Bulletin that sledding, while fun, can be dangerous unless limited to proper areas and accompanied by the use of good judgment. The bulletin provided several examples of bad judgment that had led to injuries in the past. Furthermore, the campus police halted any unsafe sledding and other dangerous activities that the officers observed. Because the particular risk in this case of colliding with the light poles was obvious and apparent to everyone, including the plaintiff and his companions, no warning was required, and the defendant did not breach its duty of reasonable care by failing to warn of that particular risk or by failing to erect protective barriers.

WATSON, Justice, dissenting.

The majority opinion ignores the expert testimony of Dr. Dan Corbin that hay bales could have protected the cement light poles from student impact at minimal cost. Dr. Corbin also testified that the Assembly Center hill was the most desirable place for campus sledding. The

university could reasonably have anticipated that the sledding it encouraged would take place there. Given that encouragement, a few hay bales would not be an unreasonable burden on Louisiana Tech University.

Pitre was a thoughtful and responsible young person who would not have been sledding if he had perceived the danger. Before this tragedy, a police officer had stopped sledding at the Assembly Center because of the danger from the cement light poles. The university security department was well aware of the danger and should have warned students about the danger of the superficially alluring sledding site.

The Winter Storms Bulletin was an implicit invitation to sled at the Assembly Center. Pitre had read the Bulletin and said it was a factor in his going sledding. If the university had warned of the known danger at the Assembly Center site, he would not have gone there.

The court of appeal correctly held:

> Defendants knew that the hill at the Assembly Center was utilized by sledders. They knew that the last snow resulted in fifteen personal injuries associated with student play in the snow and icy conditions. Furthermore, the danger presented by the light poles in the parking lot at the Assembly Center was such that serious injury was likely to occur should a sledder strike one of the posts. As noted above, the burden of prevention was minimal to the university; there were several inexpensive measures that could have been implemented to either warn students of the danger presented or to make the hill safe. The only positive action taken by the university was to place a bulletin

> on each dorm student's bed encouraging sledding. Defendants breached the duty owed to Earl by failing to correct or warn of the danger presented by the light poles at the bottom of the Assembly Center hill.

The majority opinion conflicts with *Socorro v. City of New Orleans,* 579 So.2d 931 (La.1991). Diving into unknown waters is an obvious danger, at least as obvious as the base of this pole. Here, as in Socorro, plaintiff's negligence does not eliminate the university's duty to warn against sledding at this dangerous site. The court of appeal correctly assessed fault at 75% to Pitre and 25% to Louisiana Tech University. Hay bales around the poles would not have been an unreasonable burden for the university and would have prevented this tragic accident.

The majority opinion seeks to renew the doctrines of assumption of the risk and contributory negligence. Even so, the majority is wrong. This writer does not believe for one moment that young Pitre said to himself: "I am going to slide down the hill and take the risk of hitting one of those poles." Simply put, he foolishly ignored the poles and the danger, just as did Tech. Their negligence was properly compared.

I respectfully dissent.

APPENDIX B

[SEAL]

SUPREME COURT
STATE OF LOUISIANA
New Orleans

PASCAL F. CALOGERO, JR.
CHIEF JUSTICE — 301 LOYOLA AVE., 70112

JOHN TARLTON OLIVIER — TELEPHONE 504-568-5707
CLERK OF COURT

June 28, 1996

(Filed July 1, 1996)

Hon. Mack E. Barham
Robert E. Arceneaux, Esq.
Hansel M. Harlan, Esq.
Barham and Arceneaux
650 Poydras St.
Suite 2700
New Orleans, LA 70130

Gregory P. Massey, Esq.
Attorney at Law
P. O. Box 3148
Lake Charles, LA 70602

William C. Henry, Esq.
Hudson, Potts & Bernstein
P.O. Box 3008
Monroe, LA 71210

Re: Earl J. Pitre, Jr., et al vs. Louisiana Tech University, et al
No. 95-C-1466

Dear Counsel:

Enclosed please find a News Release documenting this court's denial of the application for rehearing, in the above entitled referenced case.

This judgment is now final. By copy of this letter we are advising both the trial court and appellate court of the finality of this case and instructing them to do whatever is necessary to implement the judgment.

With kindest regards, I remain,

Very truly yours,

/s/ John Tarlton Olivier
John Tarlton Olivier
Clerk of Court

JTO:kf
Enclosure
ccs: Hon. James M. Dozier
Hon. Dianna Pratt-Wyatt
Hon. Sue Sanderson
Hon. Richard P. Ieyoub

SUPREME COURT OF LOUISIANA

FOR IMMEDIATE NEWS RELEASE — NEWS RELEASE # 074

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the *28th day of June, 1996,* the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

REHEARINGS DENIED:

94-KA-2078 STATE OF LOUISIANA v. EDDIE MITCHELL, JR. (Parish of Calcasieu)

95-C-1466 EARL GARLAND PITRE, JR., ET AL v. LOUISIANA TECH UNIVERSITY, ET AL (Parish of Lincoln)
WATSON, J. – would grant a rehearing.
JOHNSON, J. – would grant a rehearing.

95-CC-2066 MARCIA THOMAS PENDLETON v. DR. ROBERT L. BARRETT, ET AL (Parish of Natchitoches)
MARCUS, J. – dissents.
LEMMON, J. – dissents.
VICTORY, J. – dissents.

95-C-2270 AMY ELIZABETH BAUMEISTER v. LOYCE PLUNKET, ET AL (Parish of Caddo)

95-C-2452 PLAQUEMINES PARISH GOVERNMENT v. GETTY OIL CO., TEXACO PRODUCING, INC. TEXACO, INC., EXXON CORP. CHEVRON U.S.A., INC., ET AL (Parish of Plaquemines)
LEMMON, J. – would grant a rehearing.

95-KK-2483 STATE OF LOUISIANA v. DENARD ALONZO AND KATHLEEN JARVIS (Parish of Orleans)
LEMMON, J. – not on panel.

95-C-2571 ST. CHARLES PARISH SCHOOL BOARD v. P & L INVESTMENT CORPORATION (Parish of St. Charles)

95-K-2920 STATE OF LOUISIANA v. LONNIE P. FONTENOT (Parish of Evangeline)
MARCUS, J. – not on panel.
WATSON, J. – would grant a rehearing.
BLEICH, J. – would grant a rehearing.

95-C-2933 RODNEY BREAUX v. WILFRED HOFFPAUIER AND LOUISIANA WORKER'S COMPENSATION CORPORATION
WATSON, J. – would grant a rehearing.

APPENDIX C

26,388 (La.App. 2 Cir. 5/10/95)

Earl PITRE, Jr., et al., Plaintiffs-Appellants,

v.

LOUISIANA TECH UNIVERSITY, et al., Defendants-Appellees.

No. 26388-CA.

Court of Appeal of Louisiana, Second Circuit.

May 10, 1995.

University student who was paralyzed in sledding accident on campus and his parents filed damages action against university and board of trustees for state colleges and universities. The Third Judicial District Court Parish of Lincoln, No. 37,578, granted summary judgment for university and board, and student and parents appealed. The Court of Appeal, 596 So.2d 1324, reversed and remanded. On remand, the District Court, James M. Dozier, Jr., J., again entered judgment for university and board. Student and parents appealed, and the Court of Appeal, Brown, J., held that: (1) issue of whether university and board owed duty to student should not have been revisited by trial court on remand; (2) university and board breached duty owed to student; (3) conduct of university and board and conduct of student both contributed to accident and student's resulting injuries; (4) conduct of university and board was legal cause of student's injuries; (5) appropriate fault attributed to university and board was 25% and appropriate fault attributed to student was 75%; and (6) student and his parents were

entitled to recover their damages, minus percentage thereof.

Judgment reversed and damages awarded.

Hightower, J., filed dissenting opinion.

Gregory P. Massey, Lake Charles, for appellants.

Barham & Arceneaux by Mack E. Barham, New Orleans, Hudson, Potts & Bernstein by W. Craig Henry, Monroe, for appellees.

Before MARVIN, HIGHTOWER, BROWN, WILLIAMS and STEWART, JJ.

BROWN, Judge.

During an unusual winter storm in 1988, Earl Garland Pitre, Jr., a 20- year-old resident student at Louisiana Tech University, joined a number of other students in sledding down a hill at the school's Assembly Center. Tragically, Pitre's sport ended when he struck a light pole in the parking lot at the bottom of the hill. He is now a paraplegic.

The trial court dismissed Pitre's lawsuit against Tech on a summary judgment motion. Because the danger was obvious, the trial court ruled that Tech owed no duty to warn or protect students engaged in this voluntary activity. On appeal this court concluded that a duty existed due to Tech's ownership or custody of the land and its special relationship to its students. The case was reversed and remanded for trial on the merits to determine outstanding issues of breach, causation, comparative fault and damages. *Pitre v. Louisiana Tech University,* 596 So.2d

1324 (La.App. 2d Cir.1991), *writ denied*, 604 So.2d 998 (La.1992).

On remand and after trial, Pitre's claims were rejected as the trial court again found that Tech owed no duty to Pitre. On the duty issue, however, the facts at trial were substantially identical to those presented in the summary judgment motion. Thus, we reverse and render judgment for plaintiffs, allocating fault and assessing damages.

LAW OF THE CASE

The initial issue presented relates to the effect of the decision rendered by this court in the first appeal. Was it the "law of the case" and determinative of the duty question? The term "law of the case" denotes a principle that recognizes the binding force of trial court rulings during later stages of the trial, **the conclusive effects of appellate decisions at the trial on remand, and that an appellate court will ordinarily not reconsider its own rulings of law on a subsequent appeal in the same case.** *Day v. Campbell-Grosjean Roofing & Sheet Metal Corp.*, 260 La. 325, 256 So.2d 105 (1971); *Petition of Sewerage & Water Board of New Orleans*, 278 So.2d 81 (La.1973) (emphasis added). The law of the case doctrine avoids indefinite relitigation of the same issue, obtains consistent results in the same case, affords one opportunity for argument and decision and provides fairness to the parties involved. *Coldwell Banker v. City Bank & Trust*, 25684 (La.App. 2d Cir. 03/30/94), 634 So.2d 959; *Clomon v. Monroe City School Board*, 557 So.2d 1100 (La.App. 2d Cir.1990), *affirmed*, 572 So.2d 571 (La.1990).

The law of the case doctrine has been conditioned to apply only where the facts and issues on the subsequent remand or appeal are substantially the same as those involved in the prior appeal. Changes in the evidence that do not substantially affect the questions involved or the presentation of evidence that is cumulative will not defeat applicability of the law of the case doctrine. 5 Am.Jur.2d Appeal and Error § 746 (supp. 1994) (emphasis added).

The historical background for this court's first appellate decision on the duty question is fully set out in that opinion. *Pitre, supra.* Primarily the same evidence was introduced at the trial on the merits. The additional evidence presented addressed principally the issues of causation and damages. By way of introduction, the relevant factual background is set forth below.

FACTS

An ice and snow storm moved through northeast Louisiana in early January 1988. Prior to the storm, the Louisiana Tech Housing Office issued a winter bulletin to all dormitory residents. The bulletin, entitled "Winter Storms and Louisiana Tech", was placed on the beds of each dorm resident by a staff member. The following is excerpted from the bulletin:

> We encourage snowmen, sledding, etc., in proper areas and using good judgment. We discourage sledding down the hills along Tech Drive into the path of oncoming cars – not good judgement [sic] – nor is being dragged behind a moving vehicle considered good judgement [sic]. Fifteen reported personal injuries were

associated with such behavior during the last snow.

Earl Pitre, Jr., was a sophomore at Louisiana Tech in January 1988. Earl, who lived in a dormitory on campus, attended a Lady Techsters basketball game the evening of January 7, 1988. Classes had been canceled that day as a result of the ice storm and many students, confined to the campus by the weather, took the opportunity to enjoy the snow. After the game, Earl met with some friends who were going sledding off the hill between the Thomas Assembly Center and the Joe Aillet Football Stadium. The hill, which was approximately 85 feet high, led to a large, open parking lot, which was illuminated by several large light posts spaced approximately 150 feet apart. On the other side of the parking lot was the football stadium.

The students at the Assembly Center used makeshift sleds, such as cardboard boxes, plastic advertising signs and serving trays. Also utilized by the sledders were part of a rocking chair and a toilet seat. The most popular sled was a large, round, plastic trash can lid, approximately five feet in diameter. Because the lid was faster, traveled further and would hold several people on one ride, students waited in line for its use. After several trips down the hill on a cardboard sled, Earl joined the line of students who were using the lid. While riding on the lid, Earl and three other students struck one of the concrete-based lights in the parking lot. Earl received head and back injuries in the accident and is paralyzed from mid-chest down.

Earl and his parents filed suit against Louisiana Tech and the Board of Trustees for State Colleges and Universities, alleging that the university was negligent in failing to prohibit sledding around the Thomas Assembly Center and in failing to warn of the hazards of sledding in that area. Plaintiffs also alleged that Louisiana Tech was negligent in encouraging sledding in areas known to be hazardous and in failing to place cushions around the bases of the light posts in the parking lot.

Plaintiffs and defendants filed motions for summary judgment. The trial court found that there were no disputed issues of material fact and that the issue was whether plaintiffs or defendants were entitled to judgment as a matter of law. The trial court denied plaintiffs' motion for summary judgment, granted defendants' motion and dismissed plaintiffs' demands.

Plaintiffs appealed. This court concluded that the trial court erred in finding that no duty existed, reversed and remanded for trial. *Pitre, supra.*

Trial was held in March 1993. The trial court once again found that defendants did not have a duty to implement, disseminate or enforce a no-sledding policy on campus. Judgment in defendants' favor was rendered and plaintiffs' demands were dismissed on January 14, 1994. It is from this judgment that plaintiffs appeal, arguing that the trial court erred in revisiting the duty issue and in failing to find that their injuries were caused by defendants' negligence.

APPLICABLE LEGAL PRINCIPLES

LSA-C.C. Art. 2315 provides in part that every act of man that causes damage to another obliges him by whose fault it happened to repair it. If this act involves the failure to exercise reasonable care, it is deemed negligence. *Meany v. Meany,* 94-0251 (La. 07/05/94), 639 So.2d 229.

In order to prevail in a negligence action, a plaintiff must prove:

(1) the defendant had a duty to conform his or her conduct to a specific standard of care (the duty element);

(2) the defendant failed to conform his or her conduct to the appropriate standard (the breach of duty element);

(3) the defendant's substandard conduct was a cause in fact of the plaintiff's injuries (the cause in fact element);

(4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of liability or scope of protection element); and

(5) actual damages (the damages element).

Mathieu v. Imperial Toy Corporation, 94-0952 (La. 11/30/94), 646 So.2d 318; *Roberts v. Benoit,* 605 So.2d 1032 (La.1991); *Fowler v. Roberts,* 556 So.2d 1 (La.1989); Thomas C. Galligan, Jr., *A Primer on the Patterns of Negligence,* 53 La.L.Rev. 1509 (1993).

Duty

Duty is defined as the obligation to conform to the standard of conduct associated with a reasonable man in like circumstances. *Fox v. Louisiana State University Board of Supervisors*, 576 So.2d 978 (La.1991). The question of whether a duty exists in a particular set of circumstances is a question of law for the court to decide. *Mathieu, supra; Berry v. Department of Health and Human Resources*, 93-2748 (La. 05/23/94), 637 So.2d 412; *Harris v. Pizza Hut of Louisiana, Inc.*, 455 So.2d 1364 (La.1984).

The duty issue was first presented to this court two years ago when plaintiffs appealed from the trial court's judgment granting defendants' motion for summary judgment, which was based on the erroneous legal conclusion that no duty was owed by defendants. We reversed and remanded the matter for trial. The following is excerpted from this court's opinion on rehearing:

> The [winter storms] bulletin established Tech's knowledge of the general risk of injuries related to sledding, stating that:
>
> > . . . Fifteen reported personal injuries were associated with such behavior (sledding) during the last snow.

On the other hand, Tech's Security Police prohibited sledding anywhere on-campus. The Security Police believed that sledding off the hill at the Thomas Assembly Center was hazardous because of the specific danger of striking a light pole in the parking lot. The policy of the Security Police was to order students to stop whenever an officer observed this activity.

> **The trial court determined that Tech owed no duty to protect plaintiff from his voluntary actions because the danger presented by the light pole was obvious. On rehearing we find this analysis and conclusion legally unsound.**
>
> A landowner or custodian owes a duty to a plaintiff to discover any unreasonably dangerous condition or use of its premises and to either correct the condition or warn of its existence. *Socorro v. City of New Orleans*, 579 So.2d 931 (La.1991).
>
> In addition to this general duty of a landowner or custodian, Tech had a duty arising out of its relationship with plaintiff as a resident student. Universities guide many aspects of student life by undertaking to provide food, housing, security and a wide range of extracurricular activities. In attempting to regulate the conduct of its students, Tech was obligated to take some reasonable and necessary steps to protect these students from foreseeable harm. . . . Arising out of its ownership or custody of the land and because of its relationship with plaintiff, Tech had a duty to protect or warn against this unreasonably dangerous activity. The trial court erred in determining by summary judgment that Tech owed no duty to protect plaintiff against this risk of harm.

Pitre, 596 So.2d at 1332-33 (emphasis added).

On remand, however, the trial court once again concluded that defendants owed no duty to Earl. According to the trial court, the existence of the winter storms bulletin did not affirmatively create a duty to provide or maintain a safe environment for sledding activities. The

trial court also found that defendants did not have a duty to implement, disseminate and enforce a "no sledding" policy on campus. The trial court committed legal error in revisiting the duty issue on remand.

The evidence introduced at trial consisted overwhelmingly of the evidence that was before the trial court in the form of depositions on the motions for summary judgment. The additional testimony elicited and depositions introduced at the trial of this matter primarily addressed the issues of causation and damages. As noted above, whether a duty is owed is a legal determination. This court's conclusion that a duty was owed by defendants is the law of the case. In light of our previous holding in this case, we conclude that the duty issue was not properly before the trial court on remand and will not be considered again by this court on appeal. That issue became final when the supreme court denied writs and the matter was remanded to the trial court. See *Shell Oil Company v. Texas Gas Transmission Corp.*, 210 So.2d 554 (La.App.1968), *writs refused*, 252 La. 847, 850, 214 So.2d 165, 166 (1968).

Breach

Through Tech's University Police, defendants were aware that students were sledding off the hill at the Thomas Assembly Center. Additionally, defendants were aware of the danger presented by the light poles in the parking lot at the foot of the hill. Therefore, they had a duty to either correct the unreasonably dangerous condition presented by the light poles or to warn of its existence.

The test for determining whether a breach of a landowner's duty to protect or warn against an unreasonably dangerous condition is whether, in the management of his property, he has acted as a reasonable man in view of the probability of injury to others. *Shelton v. Aetna Casualty and Surety Co.*, 334 So.2d 406 (La.1976); *Ladner v. Firemen's Insurance Co. of Newark*, 519 So.2d 1198 (La.App. 2d Cir.1988).

Generally, a party who owes a duty breaches that duty when he fails to exercise reasonable care in protecting those at risk. *Dobson v. Louisiana Power & Light Co.*, 567 So.2d 569 (La.1990). Factors considered in the "reasonable man" analysis include the likelihood and gravity of the harm, the burden of prevention and the social utility of defendant's conduct. *Meany, supra, citing* William E. Crowe, *The Anatomy of a Tort*, 22 Loy.L.Rev. 903 (La.1976).

Depositions of University Police officers were introduced into evidence. Several officers stated that all sledding on campus was prohibited by the University Police Department, especially in the areas along Tech Drive **and at the Assembly Center.** According to Sergeants David Sears and Bobbie Merritt and Patrol Officer Lori Scarborough, **students sliding down the hill at the Assembly Center were to be stopped because of the trees at the bottom of the hill, light poles in the parking lot and concrete posts at the stadium.** Sgt. Sears noted, "we felt that it was dangerous and once you started down the hill you had no control over whatever you were on and it could be a danger to the person that was sliding so." (emphasis added).

Testimony also establishes that the shift supervisor on duty at the time of the accident, Sergeant John Bennett, specifically told the officers on duty to keep people off the hill at the Assembly Center. As noted by Sgt. Bennett, " . . . **a young person does not see danger like a grown-up does around here and one of our duties is to try to stop them before they start**. . . . [W]e call ourselves high-priced babysitters sometimes. Some of these kids have never been away from home. And if you give them an inch they'll take a mile – some of them." (emphasis added).

Through its University Police, Tech knew of the specific danger presented to sledders by the obstacles at the bottom of the hill at the Assembly Center. On the other hand, the Housing Department issued a winter storms bulletin that **encouraged sledding on campus** except in the areas along Tech Drive. The winter storms bulletin also notes that fifteen reported personal injuries were associated with sledding during the last snow. (emphasis added).

At the time of the accident, both the University Police and the Housing Departments answered to the Dean of Student Life. Although representatives of both departments attended monthly meetings with the Dean, there was no discussion about the conflicting policies regarding sledding, nor coordination of their respective actions regarding implementation of such policies.

Dr. Dan Corbin, plaintiffs' expert in recreational safety, and Steven Bunting, plaintiffs' expert in public safety administration, testified about numerous, inexpensive measures that could have been implemented to warn

students against the danger associated with sledding at the Assembly Center. Effective warning alternatives included signs, announcements, radio advertisements, brochures and barricades. According to Dr. Corbin, who visited Tech's campus, the hill at the Assembly Center, because of its elevation, was the most desirable location for sledding. Dr. Corbin testified that this hill could have been made safe for sledding by placing bales of straw or wrapping gym mats around the light poles in the parking lot. Additional methods included the spreading of salt and sand at the bottom of the hill to slow the sledders' momentum and the placement of channeling devices or markers to limit the area where students could sled.

Defendants knew that the hill at the Assembly Center was utilized by sledders. They knew that the last snow resulted in fifteen personal injuries associated with student play in the snow and icy conditions. Furthermore, the danger presented by the light poles in the parking lot at the Assembly Center was such that serious injury was likely to occur should a sledder strike one of the posts. As noted above, the burden of prevention was minimal to the university; there were several inexpensive measures that could have been implemented to either warn students of the danger presented or to make the hill safe. The only positive action taken by the university was to place a bulletin on each dorm student's bed encouraging sledding. Defendants breached the duty owed to Earl by failing to correct or warn of the danger presented by the light poles at the bottom of the Assembly Center hill.

Cause in Fact

Cause in fact is a "but for" inquiry; if the plaintiff would not have sustained the injuries but for the defendant's substandard conduct, then such conduct is a cause in fact of the plaintiff's harm. *Roberts, supra; Fowler, supra.*

When multiple causes are present, an alternative method for determining cause in fact is the "substantial factor" test. *Fowler, supra.* Under this test, if the defendant's conduct was a "substantial factor" in bringing about the plaintiff's harm, cause in fact is established. *Roberts, supra; Dixie Drive It Yourself System New Orleans Co., Inc. v. American Beverage Co.*, 242 La. 471, 137 So.2d 298 (1962); *Weaver v. Valley Electric Membership Corp.*, 615 So.2d 1375 (La.App. 2d Cir.1993).

Based on its erroneous conclusion that no duty was owed, the trial court did not determine whether defendants' conduct was a cause in fact of the accident and plaintiffs' resulting injuries.

This determination is not simply whether the winter storms bulletin was the impetus that caused Earl to sled down the hill at the Assembly Center. The proper inquiry is whether or not defendants' failure to warn or correct the unreasonably dangerous condition presented by the light poles in the parking lot was a cause in fact of plaintiffs' injuries. Under the facts and circumstances of this case, we find that both defendants' and Earl's own conduct contributed to the accident and plaintiffs' resulting injuries.

Defendants' conduct was a substantial factor because in spite of its knowledge of the danger, it encouraged the

activity and failed to warn or protect against the unreasonably dangerous condition created by the light poles. This failure to warn or protect was a substantial factor in bringing about the accident and resulting injuries.

Earl's conduct in sledding down an icy hill into a parking lot dotted intermittently with light poles, on an over-sized garbage can lid, headfirst, lying on his back, with three other students, was also a substantial factor in causing his and his parents' injuries.

Scope of Liability or Scope of Protection

The fourth inquiry, whether defendants' conduct was a legal cause of plaintiffs' injuries, entails a determination of whether their injuries were within the contemplation of the duty set forth above. There is no rule for determining the scope of the duty; the inquiry is ultimately a question of policy as to whether the particular risk falls within the scope of the duty. *Roberts, supra; Dixie Drive It Yourself System, supra; Edwards v. State of Louisiana,* 556 So.2d 644 (La.App. 2d Cir.1990). In determining legal cause, the ease of association test asks how easily the risk of harm can be associated with the duty that was breached. *Roberts, supra; Hill v. Lundin & Associates, Inc.,* 260 La. 542, 256 So.2d 620 (1972).

We have found that one cause in fact of the accident was defendants' breach of duty by failing to warn or correct the unreasonably dangerous condition presented by the light poles in the parking lot at the bottom of a hill utilized by students for sledding. It is evident that the primary purpose for imposing such a duty is the protection of students from injuries incurred as a result of

sliding into the light poles or other objects at the bottom of the hill, such as parked or moving vehicles, trash cans or other obstacles. The risk that a student might harm himself in such a fashion was therefore clearly within the scope of protection contemplated by imposition of that duty.

Comparative Fault

Based on our finding that both parties were at fault in causing the accident and resulting injuries, we must now compare the fault of the parties, allocate the respective percentages of fault and assess damages. C.C. Art. 2323; *Rich v. Tench Electric Motor Works, Inc.*, 26,072 (La.App. 2d Cir. 08/19/94), 642 So.2d 293; *Weaver, supra.*

In *Watson v. State Farm Fire and Casualty Insurance Co.*, 469 So.2d 967 (La.1985), the supreme court set forth the following factors to be considered in allocating fault:

> (1) whether the conduct resulted from inadvertence or involved an awareness of the danger;
>
> (2) how great a risk was created by the conduct;
>
> (3) the significance of what was sought by the conduct;
>
> (4) the capacities of the actor, whether superior or inferior; and
>
> (5) any extenuating circumstances which might require the actor to proceed in haste, without proper thought.

Applying these factors, we find that defendants were aware of the danger presented by the light poles in the

parking lot and that the discretionary, sporadic, "one on one" warnings by University Police officers to students were ineffective means of protecting or warning against this dangerous condition. The magnitude and severity of Earl's injuries reflect the enormous risk created by defendants' failure to warn or protect.

Through the winter storms bulletin, university officials encouraged students to go outdoors and enjoy the unusual weather conditions. Sledding was prohibited only along Tech Drive and behind moving vehicles. The university made no effort to inform students of a safe area for sledding and in fact did not insure that there was such an area. The University Police's "no sledding" policy was at odds with the Housing Department's winter storms bulletin and reflects defendants' knowledge of the dangers faced by students who chose to engage in sledding on campus hills unsuited to such winter activity. The testimony of police personnel and Glenn Theis, acting director of the Housing Department, evidences that prior injuries were sustained by students engaged in such activities.

On the other hand, a person is legally required to recognize when his conduct involves a risk of harm and to take reasonable precautions to prevent such harm. *Socorro v. City of New Orleans*, 579 So.2d 931 (La.1991); *Dobson, supra*.

Depositions of students who were sledding at the Assembly Center on the night of the accident were introduced into evidence. According to the other sledders, the large garbage can lid was the sled of choice because it

would go faster and farther and could hold several people on one ride. Several students noted, however, the lid's tendency to spin and the lack of control over its direction. It was also noted that the lid would go even faster and travel farther when the sledders rode lying on their backs, headfirst down the hill.

Before the accident, the garbage can lid had traveled as far as the stadium on the far side of the parking lot and several students stated that the lid had even hit the stadium fence a few times. Although the light poles were noticed by the students, most of them did not perceive the danger of striking one of the poles.

Earl Pitre, Jr., was a 20-year-old sophomore at the time of the accident. Earl, being from South Louisiana, had only experienced such winter conditions on a family ski trip to Colorado a few years previously. He, like the other students, saw the light poles in the parking lot and should have recognized the unpredictability and lack of control experienced by sledders who utilized the large garbage can lid to slide down the hill. Thus, he should have considered the danger posed by the light poles in deciding to slide down the hill on the lid with three other students, headfirst, lying on his back, with no control over the direction or speed of the "sled".

On the other hand, Earl was the type of student that the trial court believed would have complied with any warning or prohibition given by the university. The winter storms bulletin, however, created an illusion of a safe activity. We should also be mindful of the testimony of Sgt. Bennett, who stated, " . . . a young person does not see danger like a grown-up does around here and one of

our duties is to try to stop them before they start . . . " We would add to Bennett's comment, "and to protect them from greater injury."

A recent decision by the Louisiana Supreme Court on comparative fault is similar to the present situation. In *Campbell v. State, Through D.O.T.D.*, 94-1052 (La. 01/17/95), 648 So.2d 898, the court stated:

> Ledford's negligence [falling asleep at the wheel] set the course for an accident to happen, but the harm or injuries to the guest passengers in Ledford's vehicle were a direct result of the impact with the concrete bridge abutment [when a guardrail would have reduced the force of the impact by 80% and significantly reduced the injuries].

In *Campbell, supra,* the court found DOTD's fault more substantial than the fault of the driver in causing the injuries. The percentage of fault was set at 75% to DOTD and 25% to the driver.

Certainly Earl's action in sledding down the hill set the course for the accident to happen. The instant case is more analogous to *Socorro, supra.* As stated in *Socorro;* "[t]he duty to recognize and take reasonable precautions to prevent harm to oneself is especially applicable to the inherently dangerous activity of diving into natural bodies of water" or as in this case, sledding down a hill into a parking lot. In *Socorro,* the supreme court apportioned 75% of the fault to the plaintiff whose injuries resulted in his quadriplegic condition. Recognizing that the assignment of fault is somewhat arbitrary, we find,

after a comparison of duty, breach and causation, the defendant's fault should be set at 25% and Earl's at 75%.[1]

Damages

Appellate courts may award damages where the trier of fact erroneously fails to do so and where the record contains sufficient proof of such damages. *Beckham v. St. Paul Fire and Marine Insurance Co.*, 614 So.2d 760 (La.App. 2d Cir.1993); *Daugherty v. Casualty Reciprocal Exchange Insurance Co.*, 522 So.2d 1323 (La.App. 2d Cir.1988).

In making an initial award of damages, we are not limited to either the highest or lowest in the range of awards which we would have affirmed on appeal. Our award should represent an amount which is fair and just for the damages sustained. *Weaver, supra; Morris v. Owens-Illinois, Inc.*, 582 So.2d 1349 (La.App. 2d Cir.1991), *writ denied*, 588 So.2d 1119 (La.1991); *Simmons v. City of Monroe*, 588 So.2d 1357 (La.App. 2d Cir.1992), *writ denied*, 591 So.2d 708 (La.1992).

Because Earl Pitre, Jr., was partially at fault in causing the accident, plaintiffs are entitled to recover their damages, minus a percentage thereof corresponding to Earl's portion of comparative fault. *Socorro, supra; Murray v. Ramada Inns, Inc.*, 521 So.2d 1123 (La.1988).

---

[1] Although there was some disagreement among the majority, this percentage assessment represents a consensus.

Earl Pitre, Jr.'s Damages

General Damages

General damages involve mental or physical pain or suffering, inconvenience, loss of gratification or intellectual or physical enjoyment, or other losses of life or lifestyle that cannot be measured definitively in terms of money. *Boswell v. Roy O. Martin Lumber Co., Inc.*, 363 So.2d 506 (La.1978); *Beckham, supra.*

The accident occurred around 11:00 p.m. on January 7, 1988. Because of weather conditions, Earl did not arrive in Lake Charles, his hometown, until the morning following his accident. Upon his arrival at St. Patrick's Hospital, he was placed in intensive care. Examinations revealed a total loss of neurological function below the T-6 level. X-rays showed fractures of the posterior elements of the T-6 and T-7 and the transverse process of T-8. One of Earl's lungs collapsed and he developed pneumonia. Because of these complications, Earl's doctors could not remove bone fragments or stretch his spinal cord back to its original position until seven days after the accident. At that time, luque rods were inserted and grafted into place with bone grafts from Earl's hips, an infrequently performed procedure made necessary because of Earl's size (6'0" tall, approximately 200 pounds).

Earl was transferred to F. Edward Hebert Rehabilitation Hospital in New Orleans on January 25, 1988, for physical and respiratory therapy. During this first stay, Earl was taught to do "wheelies" in his wheelchair for relief of pressure and prevention of bedsores. Earl also learned how to get back into his wheelchair should he fall. Therapists showed Earl how to dress and bathe

himself and how to insert a catheter for urination. He also learned how to perform the tedious bowel program required by his condition.

On March 4, 1988, Earl was discharged from F. Edward Hebert and allowed to go home. However, on the trip back to Lake Charles, he began running a high temperature and spotted blood in his urine. Earl was taken to the emergency room at Lake Charles Memorial Hospital where he was diagnosed with a urinary tract infection. He was subsequently admitted to the hospital that evening and was discharged on March 10th. Earl returned to F. Edward Hebert on April 4th for three more weeks of intensive rehabilitation.

Earl has experienced recurring infections since the accident. He experiences three to four urinary tract infections a year which are frequently stress-related. Additionally, he has been hospitalized for other infections and complications, such as extreme swelling and clotting and bladder and kidney problems.

Earl's physicians expect continued problems with urinary tract infections and bladder stones, which are secondary to his bladder condition and recurring infections. Because of the level of spinal injury, Earl's lung capacity is impaired and he is prone to pulmonary infections. Potential long term risks and complications include loss of renal function, decubitis ulcers, chronic prostatis, urethritis, infections of the scrotal sac, contracture deformities of the bone, thrombophlebitis and other musculoskeletal problems.

In spite of his permanent paralysis and paraplegic condition and all of the complications related thereto,

Earl enrolled in summer school four months after his accident. He returned to Louisiana Tech in the fall of 1988 and went on to obtain a degree in human resources management. Earl then moved to Baton Rouge to attend law school at Southern University from where he was scheduled to receive his law degree this past summer.

Earl faces obstacles daily arising out of his impairment. While at law school, Earl was forced to live some 20 miles away from the campus because there was no closer "accessible" apartment. Earl has difficulty doing every day tasks such as cooking, making his bed, vacuuming and doing the laundry. At school, parking was only one of the problems Earl encountered; he also had difficulty taking exams and using the law library.

No money can adequately compensate an active 20-year-old for the loss of his legs. We find that a general damage award of $2,500,000, while in no way a substitute for the loss of mobility and functioning, will compensate Earl for his permanent disability, pain and suffering, mental anguish and loss of quality and enjoyment of life, past and future.

Special Damages

Medical Expenses

Medical expenses, past and future, which are incurred by an injured plaintiff, are recoverable as an element of damages. *Thames v. Zerangue*, 411 So.2d 17 (La.1982). The record contains uncontroverted evidence of Earl's past medical expenses in the amount of $128,770.87, which is inclusive of the costs incurred by

the Pitres in making their home accessible to Earl. These costs are recoverable by plaintiffs.

The burden of proof in a claim for future medical expenses is a preponderance of the evidence. *Jordan v. Travelers Insurance Co.*, 257 La. 995, 245 So.2d 151 (1971); *Harig v. State Through the Board of Elementary and Secondary Education*, 25,702 (La.App. 2d Cir. 03/30/94), 635 So.2d 485. An award for future medical expenses is by nature somewhat speculative. *Odom v. Claiborne Electric Cooperative, Inc.*, 623 So.2d 217 (La.App. 2d Cir.1993). Nonetheless, future medical expenses must be established with some degree of certainty. *Underwood v. Dunbar*, 628 So.2d 211 (La.App. 2d Cir.1993), *writ denied*, 94-0026 (La. 02/25/94), 632 So.2d 767. Medical testimony is needed to establish that such expenses are indicated and to set out their probable cost. *Harig, supra; Durkee v. City of Shreveport*, 587 So.2d 722 (La.App. 2d Cir.1991), *writ denied*, 590 So.2d 68 (La.1991).

Plaintiffs presented the testimony of Dr. Glen Hebert, an expert in vocational rehabilitation counseling and life care planning, regarding the cost of Earl's future care. Earl's life care plan includes anticipated future medical expenses, an evaluation to determine whether Earl can be fitted with leg braces which electronically stimulate leg movement and necessary equipment such as wheelchairs, a walker, adaptive furniture and recreational equipment and an environmental control unit. Dr. Hebert also factored in the costs of modifying a house in which Earl could achieve his goal of independent living. Plaintiffs' economist, Dr. Gerald Lee, testified that Earl's life care plan had a present value of $1,163,831. This amount is

warranted by the testimony of Earl's physicians as well as the life care plan prepared by Dr. Hebert.

Loss of Earnings and Earning Capacity

Lost earnings need not be precisely proven, but they must be shown with reasonable certainty. *Moore v. Chrysler Corp.*, 596 So.2d 225 (La.App. 2d Cir.1992), *writs denied*, 599 So.2d 316, 317 (La.1992); *Finley v. Bass*, 478 So.2d 608 (La.App. 2d Cir.1985). To recover, a plaintiff must show proof to reasonably establish his claim. *Weber v. Brignac*, 568 So.2d 1129 (La.App. 5th Cir.1990).

Earl testified that prior to his accident, his intentions were to do road construction work during the summers until his graduation from Louisiana Tech in order to pay for his new truck. However, the record reflects that in previous years, Earl had chosen to attend summer school rather than work. We find insufficient proof to support an award of past lost wages.

Loss of earning capacity is not the same as lost wages; earning capacity refers to a person's potential and is not necessarily determined by actual loss. *Walker v. Bankston*, 571 So.2d 690 (La.App. 2d Cir.1990); *Finnie v. Vallee*, 620 So.2d 897 (La.App. 4th Cir.1993), *writ denied*, 625 So.2d 1040 (La.1993). Damages for loss of earning capacity are based on the injured person's ability to earn. *Hobgood v. Aucoin*, 574 So.2d 344 (La.1990); *Laing v. American Honda Motor Co., Inc.*, 628 So.2d 196 (La.App. 2d Cir.1993), *writ denied*, 94-0375 (La. 03/25/94), 635 So.2d 239.

In determining whether a plaintiff is entitled to recover for loss of earning capacity, the court should consider whether and how much plaintiff's current condition disadvantages him in the work force. The inquiry is what plaintiff might have been able to earn but for his injuries and what he may now earn given his resulting condition. *Finnie, supra.*

At the time of the accident, Earl was majoring in finance. He testified that after the accident, he changed his major to human resources management and that he obtained his undergraduate degree in this field from Louisiana Tech. Because of lack of career opportunities in his chosen field, Earl decided to attend law school. As an attorney, Earl testified that his beginning salary should be in the range of $36,000 to $40,000. While Dr. Hebert did testify that Earl's disability will require adjustments in his needs, we find that the evidence was insufficient to show with reasonable certainty how his condition would impact his earning capacity as an attorney. Therefore, we make no award for loss of earning capacity.

Earl and Joan Pitre's Damages

Loss of Consortium

Parents may recover damages for loss of consortium for the loss of aid, assistance, companionship, affection, society and service attributable to the injury of a child. C.C. Art. 2315; *Worsham v. Walker,* 498 So.2d 260 (La.App. 1st Cir.1986), *writ denied,* 500 So.2d 423, 424 (La.1987).

Earl Pitre, Sr. testified that he and his son have always had a close relationship. Prior to Earl's accident,

the two enjoyed hunting, fishing and other recreational activities together. As a result of Earl's injuries, Earl and his father can no longer enjoy the activities they once participated in together. Mr. Pitre testified that the Pitres, who had previously traveled extensively as a family, are now unable to travel without making considerable adjustments for Earl's disability.

Joan Pitre testified that she has assumed most of the responsibility for Earl's care. Since the accident, she and her husband are limited in what they can do because Earl is not as independent as he was previously. Additionally, her relationship with Earl has changed as a result of the accident.

We note that Earl and his parents have continued to be close and enjoy a loving, caring relationship. However, there has been a change in this relationship as a result of the accident. We feel that an award of $35,000 to each parent is warranted in this case.

CONCLUSION

For the reasons set forth above, the judgment of the trial court is REVERSED and judgment is RENDERED as follows:

(1) Plaintiff, Earl Pitre, Jr. is awarded the following damages, with legal interest from date of judicial demand, subject to reduction according to his fault (75%):

General Damages:	$2,500,000.00
Special Damages:	1,292,601.87
	$3,792,601.87

(2) Plaintiffs, Earl and Joan Pitre, are each awarded $35,000, together with legal interest from date of judicial demand, for loss of consortium, subject to reduction according to plaintiff's, Earl Pitre, Jr.'s, fault (75%).

(3) Costs, here and below, are taxed against defendants.

HIGHTOWER, J., dissents with written reasons.

HIGHTOWER, Judge, dissenting.

The majority, after administering itself a strong shot of "law of the case," grasps tightly the earlier 3-2 decision (which, incidentally, changed an initial 2-1 decision) and boldly declares that the duty issue stands closed. I find myself, however, strongly disagreeing.

The law of the case concept merely expresses the general practice of courts to refuse to reopen what has been decided. *Day, supra.* That approach nevertheless is one of practice or court policy, and not of inflexible law, so that appellate courts may exercise discretion in its application. *Dodson v. Community Blood Center of La., Inc.*, 633 So.2d 252 (La.App. 1st Cir.1993), writs denied, 93-3158, 93-3174 (La. 03/18/94), 634 So.2d 850, 851; *Brumfield v. Dyson*, 418 So.2d 21 (La.App. 1st Cir.1982), writ denied, 422 So.2d 162 (La.1982). The theory certainly should not be applied when to do so accomplishes or continues an obvious injustice, or where the former appellate ruling is palpably erroneous. *Day, supra; Alessi v. Belanger*, 93 2047 (La.App. 1st Cir. 10/07/94), 644 So.2d 778; *Widman v. Widman*, 93-613 (La.App. 3d Cir. 02/02/94), 631 So.2d 689; *Dodson, supra.*

This case came here earlier, when the trial court granted defendants' motion for summary judgment. An initial appellate panel affirmed, holding that the university owed plaintiff no duty under the circumstances involved. On rehearing, the 3-2 majority reversed, essentially predicating its determination that Louisiana Tech owed Pitre a duty upon two pronouncements: that a special relationship exists between a university and a resident student; and that it is *always* improper to consider a plaintiff's knowledge in ascertaining a defendant's duty. Inasmuch as both of these underpinnings embody fallacious postures of law, the prior decision cannot be shielded by "the law of the case."[1]

Present day colleges and universities no longer assume a role *in loco parentis*. Whatever responsibility may have existed in an earlier era, today's trustees and administrators have been forced to yield to the expanding privileges of their students. Modern college students, no longer considered children of tender years, inevitably will be involved in relatively rare, even sometimes tragic, incidents. Yet acceptance of the majority's response, by imposing the duties which plaintiff seeks, would command from our institutions of higher learning such increased cost, and enhanced burdens, as could seriously impede their vital educational missions. For a discussion

---

[1] The supreme court writ denial, 604 So.2d 998 (La.1992), which the majority maintains finalized the duty question, is not an affirmative endorsement of the original decision. Instead, it simply reads: "Review of the court of appeal's denial of defendant's motion for summary judgment is not warranted at this state of the proceeding."

of the outmoded *in loco parentis doctrine*, see *Alumni Association v. Sullivan*, 524 Pa. 356, 572 A.2d 1209 (1990); *Millard v. Lambda Chi Alpha*, 416 Pa.Super. 475, 611 A.2d 715 (1992). Tech plainly is not the insurer of its students' safety. See *Denver v. Whitlock*, 744 P.2d 54 (Colo.1987); *Beach v. University of Utah*, 726 P.2d 413 (Utah 1986). Even more clearly, adult students of a university are responsible for protecting themselves from their own reckless actions.

As for a plaintiff's knowledge, although "assumption of the risk" no longer bars recovery, the supreme court has not abandoned knowledge or awareness as a criterion in assessing duty. Instead, when a potentially dangerous condition is obvious, it may be found that a defendant owed no duty:

> [C]are should be taken to note that we maintain our policy that "the duty which a landowner owes to persons entering his property is governed by a standard of reasonableness, and that a potentially dangerous condition that should be obvious to all comers is not, in all instances, *unreasonably* dangerous." [Citations omitted, emphasis in original.] Therefore, under a duty/risk analysis, if the facts of a particular case warrant, there could be a finding that a defendant owed no duty under the circumstances. . . .

Socorro v. City of New Orleans, 579 So.2d 931, 941-42 (La.1991). The instant case convincingly presents such a situation. Before a duty to warn or protect arises, an unreasonably dangerous condition must be found. And, in the process of that inquiry here, knowledge enters the equation.

The light post which Pitre struck could clearly be seen in the parking lot. Moreover, he had passed by the several posts there on numerous occasions, even during his earlier sleddings on the night of the accident. Anent utility, the lamp posts served to illuminate the stadium parking lot and ensure safe passage of pedestrians and motorists alike. Hence, the object in question did not become dangerous until Pitre chose to sled, on his back, head first, down a hill on an apparatus over which he had no control. Indeed, at trial, Pitre acknowledged that he did not need to be warned of the risk of colliding with a fixed object while travelling at a high speed. Furthermore, any danger in sledding at the chosen location could easily be observed by – to borrow from *Socorro* – "all comers." Accordingly, the peril, if any, presented by the light post did not rise to the level of being unreasonably dangerous.

Nor do I agree that the winter storms bulletin, distributed through Tech's housing office, *encouraged* a dangerous activity. In its reasons for judgment, the trial court commented on the purpose of this missive, noting that it served to *remind* the students to use common sense and good judgment while sledding. The publication did not offer a blanket sanction of all sledding in any area, and under any circumstance. The housing office set forth only certain examples of poor judgment encountered during past experiences: sledding behind vehicles and sliding down the hill into oncoming traffic. It would have been impossible for the document to enunciate and caution against every conceivable activity whereby a student could be injured because of the weather conditions. The bulletin did warn against using poor judgment, however, which obviously precipitated this accident.

In stating that sledding itself is not innately dangerous, the trial court accurately compared the present situation to others which might transpire on campus:

> The activity of sledding is not inherently dangerous any more than is skateboarding, riding a bicycle, or driving. All of these activities require the participant to take responsibility for guiding the chosen vehicular device to avoid collision. Certainly there is likelihood of injury if the user of any of these devices collides with a fixed object. We take for granted that the user knows this. In this case, all participants were certainly aware of that fundamental principle. . . . The combination of the weather conditions, the sledding apparatus, and the position of the sledders combined to cause this tragedy.

Directly put, plaintiff's injuries resulted from his own choices. As a 20-year-old adult, he chose to lay backwards on a garbage lid and to slide, head first and for the seventh time, down a snow-covered incline toward a well-lit parking lot containing several light posts.

Said again, and in summary, plaintiff's injuries resulted from his own choices. No commonsense, fair-minded approach to "duty" should now impose the consequences of his actions upon this state's tax-paying citizens. Indeed, to do so stretches the law's appropriate role beyond all recognition, while divining a responsibility by society toward those who engage in virtually any bizarre activity. Hopefully, such a perversion of the tort system will not long persist.

I dissent.

Supreme Court, U.S.
FILED
OCT 24 1996
CLERK

No. 96-452

In The

Supreme Court of the United States

October Term, 1996

EARL G. PITRE, Jr., EARL G. PITRE, Sr. and JOAN PITRE,

Petitioners,

vs.

LOUISIANA TECH UNIVERSITY AND THE STATE OF LOUISIANA THROUGH THE BOARD OF TRUSTEES FOR STATE COLLEGES AND UNIVERSITIES,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Louisiana

RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM CRAIG HENRY
Special Assistant Attorney General to Richard P. Ieyoub
Attorney General, State of Louisiana
Counsel of Record for Respondents
HUDSON, POTTS & BERNSTEIN, L.L.P.
Post Office Box 3008
Monroe, Louisiana 71210
(318/388-4400)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

21 pp

TABLE OF CONTENTS

Page

Table of Contents i

Table of Citations ii

Statement of Jurisdiction 1

Statement of the Case 1

A. Course of Proceedings and Disposition of the Case Below 2

B. Correction of Misstatements in the Petition ... 5

Reasons for Denying the Writ 7

I. This Court has no jurisdiction to consider petitioners' arguments 7

II. The Louisiana Supreme Court applied the appropriate standard for appellate review of facts 10

III. There is no due process or equal protection right to a failure to follow the appropriate appellate standard for review of facts 15

IV. Since petitioners failed below to claim any violation of their Louisiana constitutional rights they cannot now make that claim before this Court 17

Conclusion 18

TABLE OF CITATIONS

CASES CITED:

Beck v. Washington, 369 U.S. 541, 8 L.Ed.2d 98, 82 S.Ct. 955 (1962) 8, 15, 17

Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969) 8

Illinois v. Gates, 462 U.S. 213, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983) 8

Monks v. New Jersey, 398 U.S. 71, 26 L.Ed.2d 54, 90 S.Ct. 1563 (1970) 8

Pacific Mutual Life Insurance Company v. Haslip, 499 U.S. 1, 113 L.Ed.2d 1, 111 S.Ct. 1032 (1991) 16

Pitre v. Louisiana Tech University, 596 So.2d 1324 (La. App. 2nd Cir. 1991) 3, 11, 12, 13

Pitre v. Louisiana Tech University, 604 So.2d 998 (La. 1992) 3

Pitre v. Louisiana Tech University, 655 So.2d 659 (La. App. 2nd Cir. 1995) 4, 13, 14

Pitre v. Louisiana Tech University, 673 So.2d 585, Nos. 95-1466, 95-1487 (La. 5/10/96), rehearing denied 95-C-1466 (6/28/96) 1

Stovall v. City of Monroe, 199 La. 195, 5 So.2d 547 (La. 1941) 17

Street v. New York, 394 U.S. 576, 22 L.Ed.2d 572, 89 S.Ct. 1354 (1969) 8

TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 125 L.Ed.2d 366, 113 S.Ct. 2711 (1993) 16

United States ex rel. Darcy v. Handy, 351 U.S. 454, 100 L.Ed. 1331, 76 S.Ct. 965 (1956) 15

Webb v. Webb, 451 U.S. 493, 68 L.Ed.2d 392, 101 S.Ct. 1889 (1981) 8, 9

Yee v. Escondido, 503 U.S. 519, 118 L.Ed.2d 153, 112 S.Ct. 1522 (1992) 7

RESPONDENTS' BRIEF IN OPPOSITION

Respondents request that the Court deny the petition for writ of certiorari seeking review of a decision of the Supreme Court of the State of Louisiana. That decision is reported at 673 So.2d 585, Nos. 95-1466, 95-1487 (La. 5/10/96) (Appendix A to the petition). The Louisiana Supreme Court denied rehearing on June 28, 1996, 95-C-1466 (Appendix B to the petition).[1]

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). The alleged constitutional issue presented for review in the petition was not presented to the Louisiana Supreme Court. Thus, that issue may not properly be considered on a petition for writ of certiorari to this Court. See discussion at pages 7-10 below.

STATEMENT OF THE CASE

Respondents respectfully oppose the petition for writ of certiorari. Jurisdiction in this Court is not proper because in their application for rehearing before the Louisiana Supreme Court petitioners did not contend, as they do in the petition, that the court violated petitioners' due process and equal protection rights by allegedly failing to

[1] All citations to the Louisiana Supreme Court's decision will be to the opinion attached as Appendix A to the petition.

follow the appropriate standard of appellate review. Furthermore, petitioners are mistaken in their view that the Louisiana Supreme Court failed to follow the appropriate standard of review. It is clear from the court's opinion that the standard was correctly followed.

Petitioners' argument that this alleged failure by the Louisiana Supreme Court to follow the appropriate standard of review violates petitioners' constitutional rights under the due process clause of the Fourteenth Amendment of the Constitution is also insubstantial. Finally, to the extent petitioners claim the Louisiana Supreme Court also violated petitioners' rights under the Louisiana Constitution, since that argument also was not first presented to the Louisiana Supreme Court for its review, this Court is prohibited from considering it.

A. Course of Proceedings and Disposition of the Case Below.

This is a personal injury suit brought by Earl G. Pitre, Jr. and his parents against Louisiana Tech University and the university's governing board, the Board of Trustees for State Colleges and Universities. In their suit plaintiffs claimed that the defendants were responsible for an accident on the university campus when Mr. Pitre, Jr. struck a light pole while sledding causing him to be paralyzed from approximately the mid-chest down.

Plaintiffs' suit was filed in the Third Judicial District Court, Parish of Lincoln, State of Louisiana. In response to plaintiffs' suit the defendants filed a motion for summary judgment contending that the light posts in the

parking lot were readily observable and thus not unreasonably dangerous and that defendants had no duty to warn of the existence of this condition.

Plaintiffs filed a cross motion for partial summary judgment arguing that the university was liable for Mr. Pitre's injuries as a matter of law and leaving for trial the issues of damages and plaintiffs' comparative negligence. The trial court granted the university's motion for summary judgment and dismissed plaintiffs' suit. The trial court found that there was no dispute of fact as to whether the light poles were easily observable and that as a matter of law the defendants had no duty to warn Mr. Pitre of this readily observable condition.

Plaintiffs appealed to the Louisiana Second Circuit Court of Appeal. On original hearing before a three judge panel of that court in a two to one decision the judgment of the trial court was affirmed. However, a rehearing was granted before a five judge panel, and the judgment of the trial court was reversed in a three to two decision. *Pitre v. Louisiana Tech University*, 596 So.2d 1324 (La. App. 2nd Cir. 1991), on rehearing, rehearing denied. (*"Pitre I"*) On the summary judgment record the court found a fact based duty of Louisiana Tech to plaintiffs and remanded the case for trial. The Louisiana Supreme Court denied defendants' application for writ of certiorari. *Pitre v. Louisiana Tech University*, 604 So.2d 998 (La. 1992).

Following a six day bench trial in March of 1993 the trial judge again found that the university had no duty

under the facts as found by the trial court[2] and dismissed plaintiffs' suit. On appeal in a four to one decision a five judge panel of the Second Circuit Court of Appeal reversed the trial court. *Pitre v. Louisiana Tech University*, 655 So.2d 659 (La. App. 2nd Cir. 1995). ("*Pitre II*") The court found that the trial judge erred in revisiting the duty issue because the Second Circuit's finding of a duty on the original summary judgment appeal was the "law of the case". The court then found both the university and Mr. Pitre to be negligent under the circumstances and responsible for Mr. Pitre's injuries and apportioned fault twenty-five percent to the university and seventy-five percent to Mr. Pitre. The court awarded Mr. Pitre general damages of $2,500,000.00, past medical expenses of $128,770.87 and $1,163,831.00 in future medical expenses based upon the present value of the life care plan. Mr. Pitre's parents were each awarded $35,000.00 for loss of consortium. The court rejected Mr. Pitre's claims for past wage losses and loss of future earning potential.

The Louisiana Supreme Court granted applications for writs of certiorari filed by both plaintiffs and defendants. In a five to two decision the Louisiana Supreme Court reversed the Court of Appeal decision and dismissed plaintiffs' suit. After examining the evidence, two justices agreed with the trial court who had found on two separate occasions (the motion for summary judgment and the trial on the merits) that the area where the sledding took place was well lit and that the light pole was "readily observable" or "clearly visible" by those engaged in sledding that night. App. 17. On this basis

---

[2] The decision of the trial court is unreported but is contained in the appellate record.

these justices found that the defendants had no duty to warn since the likelihood of harm was slim to anyone exercising reasonable care.

Three other justices based their decision to deny plaintiffs' claim on the basis that the defendants had not breached their general duty to act reasonably in view of the foreseeable risks of danger to students resulting from the winter storm in question. Two justices dissented.

Plaintiffs timely filed an application for rehearing in the Louisiana Supreme Court and supplemented that application with an additional memorandum. In the application and its supplement the plaintiffs complained, as they do now in this court, among other things, that the concurring justices erred in failing to apply the proper standard of appellate review. However, the plaintiffs *did not claim* that any such error violated any of plaintiffs' constitutional rights under either the Constitution of the United States or the Louisiana Constitution.

The Louisiana Supreme Court denied plaintiffs' application for rehearing without opinion. See App. 34. Plaintiffs now seek to have this Court grant a writ of certiorari to review the decision of the Louisiana Supreme Court.

B. Correction of Misstatements in the Petition.

The opinion of the Louisiana Supreme Court correctly sets forth the facts of this case. See Appendix A. In the interest of making this brief as concise as possible respondents respectfully direct the Court's attention to the facts as set forth therein.

Of significance to the finding of no duty by two justices and no breach of duty by the concurring justices was the conclusion that the trial court was correct in its factual finding that "the area was well-lit on the evening of the accident, and that the light pole was 'readily observable' or 'clearly visible' by those engaged in sledding that night." App. at 17. In support of its conclusion, the court at length reviewed the facts presented to the trial court (App. 17-19) and said:

> "This evidence overwhelmingly demonstrates that the parking lot was well-lit, and as the trial court found, that the light pole should have been readily apparent and observable to anyone sledding on the Assembly Center hill on the evening of the accident. Thus, the likelihood of harm was slim to anyone exercising reasonable care." App. at 19-20

Significantly, the court of appeal did not disturb the trial court's finding of fact in that regard. The court of appeal did not even discuss that factual issue. Thus, plaintiffs cannot now complain, as they attempt to in their "factual background" that the "base of the pole . . . was not illuminated" or that otherwise the pole was difficult to see. Petition at page 6.

Plaintiffs' attempt to reargue the facts is without avail. The five justices voting to overturn the court of appeal did so on the factual basis that, as the trial court found, "the area was well-lit on the evening of the accident, and that the light pole was 'readily observable' or 'clearly visible' by those engaged in sledding that night." App. at 17.

It should be noted, however, that with respect to plaintiffs' contention concerning campus police policy, the supreme court said:

> "The trial court held that Tech did not have a departmental policy regarding sledding in general, but would stop it on a case-by-case basis depending on the individual officer and the situation. The record supports this finding." App. at 23.

Interestingly, the court of appeal in finding such a policy (App. at 43) failed to give proper deference to the trial court's finding otherwise. Thus, the court of appeal failed to apply the same appellate review standard as to factual findings that the plaintiffs contend the supreme court failed to do in its decision. Otherwise, plaintiffs attempt to rehash in their statement of facts factual issues which were disposed of by the trial judge and accurately reflected in the supreme court's opinion. Respondents respectfully refer this Court to that opinion for a correct understanding of the facts as found by the trial court. Furthermore, to the extent petitioners attempt to argue their case in the factual background, the Court should disregard that argument.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION TO CONSIDER PETITIONERS' ARGUMENTS.

As was stated by this Court in *Yee v. Escondido*, 503 U.S. 519, 118 L.Ed.2d 153, 112 S.Ct. 1522 (1992):

> "In reviewing the judgments of state courts under the jurisdictional grant of 28 USC § 1257 [28 USCS § 1257], the Court has, with very rare exceptions, refused to consider petitioner's claims that were not raised or addressed below." 118 L.Ed.2d at 169.

In *Yee* because petitioners did not raise their substantive due process claim in the state courts, and because the state courts did not address it, this Court refused consideration of it.

See also *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983); *Webb v. Webb*, 451 U.S. 493, 68 L.Ed.2d 392, 101 S.Ct. 1889 (1981); *Monks v. New Jersey*, 398 U.S. 71, 26 L.Ed.2d 54, 90 S.Ct. 1563 (1970); *Cardinale v. Louisiana*, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969); *Street v. New York*, 394 U.S. 576, 22 L.Ed.2d 572, 89 S.Ct. 1354 (1969); *Beck v. Washington*, 369 U.S. 541, 8 L.Ed.2d 98, 82 S.Ct. 955 (1962).

Petitioners contend to this Court that their Fourteenth Amendment due process and equal protection rights were violated by the Louisiana Supreme Court when it allegedly failed to follow the appropriate standard for appellate review of facts in overturning the Louisiana Court of Appeal decision and dismissing plaintiffs' suit. In their application for rehearing to the Louisiana Supreme Court plaintiffs contended that the court had failed to follow the appropriate standard for appellate review of facts. However, plaintiffs did not contend, as they do now, that this alleged failure amounted to a deprivation of their constitutional rights. Their failure to do so deprives this Court of jurisdiction.

In *Webb v. Webb*, supra, this Court explained why it should refuse the petition presented:

> "Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements.
>
> * * *
>
> There are also very practical reasons for insisting that federal issues be presented first in the state-court system. The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness and overbreadth. The rule also insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner. Finally, if the parties to state-court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to the case. In terms of our own workload, this is a very substantial matter." 451 US at 499-501.

Had the plaintiffs contended to the Louisiana Supreme Court that its alleged failure to follow the appropriate standard of appellate review violated their constitutional rights, that court could have considered and addressed that issue. In all likelihood it could have disposed of the issue in a way that would obviate the need for this Court to consider the issue as presented. However, since the issue was not raised below and the Louisiana Supreme Court did not address it this Court should decline jurisdiction on that basis.

II.

THE LOUISIANA SUPREME COURT APPLIED THE APPROPRIATE STANDARD FOR APPELLATE REVIEW OF FACTS.

Respondents agree with petitioners' statement of Louisiana law concerning the appropriate standard for appellate review of facts in Louisiana. However, petitioners apparently misunderstand that standard and they argue for a misapplication of it in this case. Additionally, they are simply wrong that the concurring justices failed to apply the appropriate standard.

If there was any misapplication of the appropriate appellate review of facts in this case it was by the court of appeal and not by the supreme court. It may be of some help to this Court to see the errors of the court of appeal which then caused this case to be presented to the supreme court in the way it was presented.

As indicated above the respondents initially moved for summary judgment on the basis that there was no dispute of fact that the pole in question was readily

observable and thus not unreasonably dangerous. The trial court agreed and dismissed plaintiffs' suit on the basis that the defendants had no duty to warn of an otherwise readily observable danger. Without disturbing that factual determination by the trial court, the court of appeal then weighed in (after initially having affirmed the trial court), sifted through some otherwise disputed facts, and on *the summary judgment record* found some facts which were clearly in dispute. For example, the court of appeal found that a winter storms bulletin published by Tech's Housing Office "established Tech's knowledge of the general risk of injuries related to sledding, stating that: . . . Fifteen reported personal injuries were associated with such behavior (sledding) during the last snow." *Pitre I* at 1332. A simple review of the bulletin shows this finding to have been in error. The court of appeal added the word "sledding" in parenthesis following the word "behavior". In fact, as the bulletin clearly shows the behavior referred to was sledding down the hills along Tech Drive *into the path of oncoming cars* and *being dragged behind a moving vehicle*. Neither of these behaviors is merely "sledding" as found by the court of appeal.

Additionally, as the record clearly shows Mr. Glenn Theis, the then acting director of housing was the person who inserted the phrase "fifteen reported personal injuries were associated with such behavior during the last snow." (Theis deposition, page 18)[3] Mr. Theis received this information from the administrator of Lincoln General Hospital. (Theis deposition, page 10) Mr. Theis

---

[3] Mr. Theis' testimony was submitted to the court by deposition which was made an exhibit at the trial.

"guessed" that about half those were from sledding behind cars. (Theis deposition, page 21) Mr. Theis did not know how many injuries resulted from sliding down hills. (Theis deposition, page 21) It is not even clear from Mr. Theis' testimony that any of the injuries actually occurred on the Tech campus. (Theis deposition, page 21) The campus police were unable to find any accident reports indicating reported injuries anywhere on campus during the previous years following the building of the Assembly Center. 3 R 888, 890 and 891.[4]

Furthermore, the court of appeal found, again, *based upon disputed facts,* without benefit of trial, that the Tech police had a policy which prohibited sledding anywhere on campus. Id. at 1332. It also found as fact on the summary judgment record that "despite that knowledge, Tech's Housing Office 'encouraged' this twenty year old student who had no prior experience with this uncommon activity to undertake the risk." Id. at 1333. This fact was clearly disputed in the summary judgment record which was before the court of appeal. It was then based upon these "findings of fact" by the court of appeal on the summary judgment record that it found a fact based duty in Louisiana Tech to Mr. Pitre under the circumstances presented.

Following a six day bench trial on the merits and a review of over fifty depositions and affidavits and numerous other exhibits, the trial court *after weighing the evidence* found that:

---

[4] The appellate record is contained in several volumes of sequentially marked pages. 3 R 888 refers to Volume 3 of the appellate record at page 888.

> "The Louisiana Tech University Police did not have a departmental 'policy' regarding sledding in general. Several officers answered, in response to that question, that there was a departmental policy. As many officers responded that there was not. Each officer's response to this question indicated that he reacted to the situation as he thought appropriate under the circumstances. . . . The officers' response to sledding was no different from that to any other student activity which the officers had occasion to observe." Opinion pages 12-13.[5]

Concerning the winter storms bulletin, the trial court found that:

> "Furthermore, the winter storms bulletin was not the impetus which began this particular activity. . . . No one, including Mr. Pitre, testified that the document was discussed or considered prior to these sledding activities." Opinion pages 11-12.

As is shown by reference to *Pitre II* (App. B), although that court did not disturb (or even discuss) the trial court's factual finding with respect to the observability of the pole, the court wrapped itself in its former decision finding a duty (*Pitre I*) and reversed the trial court based on "law of the case". It was there that the court of appeal fell into error because in the first instance (*Pitre I*) it had attempted to act as a fact finder on a summary judgment record and then it compounded that

---

[5] The opinion is contained within the appellate record.

error following the trial (*Pitre II*) by refusing to give proper deference to the trial court's fact finding.

Thus, on the record in the Louisiana Supreme Court there were factual findings of the trial court which had not been disturbed (or even discussed) by the court of appeal. Additionally, there were factual findings by the court of appeal which differed from facts as found by the trial judge. Nowhere to be found was an explanation why the appellate court refused to defer to the findings of the trial court. Nor was there a determination that the trial court's findings were in error, manifest or otherwise.

The concurring justices gave appropriate deference to the trial court's factual findings. Justice Victory who wrote for the two justices who found no duty, at length reviewed the evidence that the light poles were obvious and apparent. It was upon that factual basis that the concurring justices found no breach of duty:

> "Because the particular risk in this case of colliding with the light poles was obvious and apparent to everyone, including the plaintiff and his companions, no warning was required, and the defendant did not breach its duty of reasonable care by failing to warn of that particular risk or by failing to erect protective barriers." (App. at 30)

Thus, the supreme court followed the appropriate appellate review of facts in giving deference to the trial court concerning a factual issue which the court of appeal did not even address. Therefore, petitioners are simply mistaken in their view that the Louisiana Supreme Court misapplied the standard of appellate review of facts.

Since petitioners raised this issue on rehearing to the Louisiana Supreme Court and the Louisiana Supreme Court refused their application for rehearing, it must have concluded that it followed the appropriate standard for appellate review.

III.

THERE IS NO DUE PROCESS OR EQUAL PROTECTION RIGHT TO A FAILURE TO FOLLOW THE APPROPRIATE APPELLATE STANDARD FOR REVIEW OF FACTS.

Even assuming petitioners are correct that the concurring justices failed to follow the appropriate standard for appellate review of facts, they have not expressed a reason why this failure should amount to a violation of their due process or equal protection rights. As this court said in *United States ex rel. Darcy v. Handy*, 351 U.S. 454, 462, 100 L.Ed. 1331, 1338, 76 S.Ct. 965 (1956):

> "While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claimed such injustice and seeks to have the results set aside, and that it be sustained not as a matter of speculation but as a demonstrative realty.' "

See also *Beck v. Washington*, supra, 369 U.S. at 558, 8 L.Ed.2d at 112.

Petitioners have failed to demonstrate any violation of their constitutional rights. They cite only a reference to

a punitive damages case[6] where the Court found that among other procedural protections, the petitioner "also received the benefit of appropriate review by the Supreme Court of Alabama." 499 U.S. at 23, 113 L.Ed.2d at 23. Taking firm grip of that statement along with their misapprehension of some comments by Justice Scalia,[7] petitioners say:

> "It is reasonable to conclude that this Court would find that the constitutional right to a substantively correct review (i.e. traditional procedure) is a fundamental right in compensatory damage awards also, and that this right is guaranteed by the due process clause of the Fourteenth Amendment." (Petition at page 11)

Thus, petitioners would contend that in *every case* where a litigant's compensatory damages have been taken away by an appellate court, there is an issue as to whether not only did that appellate court properly follow the appropriate standard of appellate review of facts *but also* whether any failure to do so violated the litigant's constitutional rights. Petitioners are saying that in every tort suit there lurk constitutional issues needing to be addressed. If this is so, can our courts handle the flood to follow? Petitioners have articulated no reason why this Court should open these flood gates.

---

[6] *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1, 18, 113 L.Ed.2d 1, 20, 111 S.Ct. 1032 (1991), where the court noted "once again our concern about punitive damages that 'run wild.' "

[7] *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 125 L.Ed.2d 366, 387, 113 S.Ct. 2711 (1993).

In discussing whether the Equal Protection Clause affords protection to a petitioner who claimed he had been denied the procedural safeguards the law affords others to insure an unbiased grand jury[8] this Court's statement may be helpful:

> "We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions . . . [or] immunity from judicial error. . . . ' *Milwaukee Electric R. & Light Co. v. Wisconsin*, 252 US 100, 106, 64 L ed 476, 480, 40 S Ct 306, 10 ALR 892 (1920). Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question."

IV.

SINCE PETITIONERS FAILED BELOW TO CLAIM ANY VIOLATION OF THEIR LOUISIANA CONSTITUTIONAL RIGHTS THEY CANNOT NOW MAKE THAT CLAIM BEFORE THIS COURT.

For the same reasons stated previously to the extent petitioners now claim for the first time that their Louisiana constitutional rights have been violated, since they did not make that claim to the Louisiana Supreme Court, they cannot make it here. Additionally, Louisiana law is clear that Louisiana appellate courts are forbidden to consider constitutional questions not raised by the pleadings at the trial court level. See *Stovall v. City of Monroe*,

---

[8] *Beck v. Washington*, supra.

199 La. 195, 5 So.2d 547 (La. 1941). Obviously, since petitioners are claiming the Louisiana Supreme Court in its decision violated their constitutional rights their first opportunity to raise that issue was on rehearing. Since they failed to raise the issue on rehearing, *a fortiori*, they should not now be allowed to raise it to this Court.

CONCLUSION

For all the reasons stated above respondents respectfully submit that this Court should decline petitioners' petition for writ of certiorari to review the decision of the Louisiana Supreme Court.

Respectfully submitted,

WILLIAM CRAIG HENRY
(LA. Bar No. 6802)
Special Assistant Attorney
General to Richard P. Ieyoub
Attorney General, State of Louisiana

Counsel of Record for Respondents
HUDSON, POTTS & BERNSTEIN, L.L.P.
Post Office Box 3008
Monroe, Louisiana 71210
(318/388-4400)